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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1908

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,
Petitioners,

v.

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, C. Thompson Stott, Ivor D. Sims, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs, George P. Jenkins and Bethlehem Steel Corporation pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on April 16, 1974.

OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania granted summary judgment for Petitioners on July 11, 1973, without opinion. The Order of the District Court granting summary judgment is printed as Appendix E hereto, *infra,* p. A30. The majority opinion of the panel of the Court of Appeals for the Third Circuit, reversing the Order of the District Court, and the dissenting opinion in the Court of Appeals, both dated April 16, 1974, are as yet unreported and are printed as Appendix D hereto, *infra,* pp. A6-A29. The Court of Appeals denied a Petition for Rehearing and Suggestion of Rehearing En Banc, without opinion. The Order denying the Petition for Rehearing is printed as Appendix B hereto, *infra,* pp. A2-A3.

JURISDICTION.

The Court of Appeals entered judgment reversing the District Court (Appendix C, pp. A4-A5) on April 16, 1974. A timely petition for rehearing containing a suggestion for rehearing *en banc* was filed by the Petitioners on April 30, 1974, and was denied by Order (Appendix B, pp. A2-A3) of the Court of Appeals *en banc* dated and entered May 15, 1974. On May 17, 1974, Petitioners filed a motion for stay of mandate pending application to this Court for a Writ of Certiorari, which the Court of Appeals granted by Order (Appendix A, p. A1) dated May 22, 1974, thereby staying its mandate until June 21, 1974.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Title 18 U. S. C. § 610, a criminal provision recently reenacted and amended in Title II of the Federal Election Campaign Act of 1971 ("FECA"), prohibits corporations and labor unions from making contributions and expenditures "in connection with" any federal election, and provides that an officer or director of any corporation, or officer of any labor organization, who consents to any such contribution or expenditure is punishable by a fine of $1,000 or imprisonment for one year, or both.

The constitutionality of this provision has twice been questioned by this Court, in *United States v. C. I. O.,* 335 U. S. 106 (1948), where four Justices concurred in the unanimous dismissal of an indictment under § 610, on the ground that § 610 is unconstitutional, and in *United States v. International Union United Auto Workers,* 352 U. S. 567 (1957), where three dissenting Justices expressed the view that this Court should reach the constitutional questions presented and declare § 610 unconstitutional, describing § 610 as "a broadside assault on the freedom of political expression guaranteed by the First Amendment", 352 U. S. at 598 (dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black and Mr. Chief Justice Warren). The constitutionality of § 610 was expressly pretermitted in *Pipefitters v. United States,* 407 U. S. 385, 400 (1972).

The questions presented are these:

1. Did the Court of Appeals err in "implying" from 18 U. S. C. § 610 a private right of action, not otherwise authorized by statute, on behalf of a stockholder and registered voter against the directors of a corporation for a corporate expenditure for advertising allegedly in violation of § 610

(i) in spite of the grave doubt concerning the constitutionality of § 610, which the Court of Appeals expressly refused to resolve, while at the same time "implying" a private right of action from the statute,

(ii) in the absence of any manifestation in the language of § 610 itself of any Congressional intent to authorize such a private right of action,

(iii) in the conceded absence of any legislative history evidencing Congressional intent to permit such a private right of action,

(iv) in the absence of any jurisdictional provision, such as that relied upon in *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964), conferring federal jurisdiction over the subject matter, and

(v) in view of the clear inference of *contrary* Congressional intent not to provide such a private remedy, to be drawn from Congress' provision of a private remedy in Title III of the Federal Election Campaign Act of 1971 and the conspicuous absence of such a remedy from Title II of the Act, which contains § 610?

2. Is the decision of the Court of Appeals, "implying" such a supplemental, private right of action from the criminal provisions of 18 U. S. C. § 610 consistent with standards articulated in *National Railroad Passengers Corp. v. National Association of Railroad Passengers*, — U. S. —, 42 U. S. L. W. 4132 (Opinion filed January 9, 1974) and *T. I. M. E., Inc. v. United States*, 359 U. S. 464 (1959)?

3. In view of the doubtful constitutionality of 18 U. S. C. § 610, did the Court of Appeals depart from

settled principles of statutory construction by *expanding* the coverage of the statute to subsume additional remedies not authorized by Congress, instead of *restricting* the scope of remedies for its violation to those expressly provided, and thereby avoiding the question of its constitutionality?

4. In view of the doubtful constitutionality of 18 U. S. C. § 610 and the rule of construction that where language of an act will bear two interpretations equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred, did the Court of Appeals err in construing the term "expenditure", as used in 18 U. S. C. § 610, in such a way as to include within the statutory prohibition an expenditure for advertising, which is not in the nature of active electioneering and only incidentally expresses a view upon important public issues, and does not so much as mention the name of any political party or candidate for election to federal office?

5. On its face and as construed and applied by the Court of Appeals, is 18 U. S. C. § 610 violative of the freedoms of speech, press, petition and association, guaranteed by the First Amendment of the Constitution of the United States?

6. On its face and as construed and applied by the Court of Appeals, does § 610's prohibition, directed only against contributions and expenditures by labor unions and corporations, deprive labor unions and corporations of the equal protection of the laws, guaranteed by the Fifth Amendment of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The First and Fifth Amendments of the Constitution of the United States and 18 U. S. C. § 610, as amended by Sections 201 and 205 of the Federal Election Campaign Act of 1971, P. L. 92-255, 86 Stat. 3, are set out in Appendix G, *infra*, pp. A43-A49.

STATEMENT OF THE CASE.

1. The Background.

An advertisement (the "Advertisement") entitled "I say, let's keep the campaign honest. Mobilize 'truth squads' . . ." appeared from on or about August 22, 1972, until September 7, 1972, in various magazines and in nineteen local newspapers in towns in which Bethlehem Steel Corporation ("Bethlehem") has plants. In connection with the September 11, 1972 mailing of a quarterly dividend to its stockholders, Bethlehem sent its stockholders a reprint of the Advertisement.

The Advertisement was based on a speech (the "Speech") given by Stewart S. Cort, Chairman of Bethlehem. As indicated in the Advertisement, the Public Affairs Department of Bethlehem sent to readers, on request, copies of the Speech and copies of a folder (the "Folder") entitled "How you can help to keep the campaign honest".

The Advertisement, the Speech and the Folder[1] encourage readers to become concerned and informed citizens, by reading books, magazines, newspapers and reports, by identifying the major issues of the day, by watching televised news programs, by listening to the views of political candidates, and by discussing current affairs and issues with friends, neighbors and business associates. Typical of the statements contained in these publications is the following excerpt from the Advertisement:

> "Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to en-

1. Reproduced as Appendices H, I and J hereto, respectively.

courage responsible, honest, and truthful campaigning. Mobilize 'truth squads', perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

The Advertisement incidentally refutes the accusation of an unnamed "political candidate" that "big business" does not pay its fair share of taxes, by quoting the following statement of Stewart S. Cort, the Chairman of Bethlehem:

"My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

Neither the Advertisement nor the Speech nor the Folder mentions the name of any political party or of any candidate for election to any federal office.

2. The Complaint.

This stockholder's action was filed against Bethlehem and its directors in the United States District Court for the Eastern District of Pennsylvania on September 28, 1972, on the eve of the 1972 Presidential election, by Richard A. Ash, Esquire ("Ash"), the owner of 50 shares of common stock of Bethlehem. The original complaint, to which is attached a copy of the Advertisement, alleged that the directors of Bethlehem had authorized an expenditure for the Advertisement and charged that such expenditure was in violation of 18 U. S. C. § 610, as amended by the FECA, P. L. 92-225, 86 Stat. 3. Count II of the original complaint charged that the expenditure was *ultra vires* and illegal under Delaware law. The complaint sought injunctive relief, including an Order that defendants place "corrective advertising at their own expense in national media", compensatory and punitive damages in favor of Bethlehem, together with costs and attorneys' fees. Federal jurisdiction in the District Court was invoked pursuant to 28 U. S. C. § 1331.

3. Application for Injunctive Relief in the District Court.

The District Court denied Ash's application for a temporary restraining order on October 13, 1972. Plaintiff's motion for a preliminary injunction was denied on October 25, 1972, after a hearing at which the parties entered into a stipulation (the "Stipulation") of uncontested facts in lieu of testimony. The Opinion of the District Court denying plaintiff's motion for a preliminary injunction is reported at 350 F. Supp. 227 (E. D. Pa. 1972) and is printed as Appendix F. The reasons for denial of the preliminary injunction are there summarized as follows (350 F. Supp. at 232):

"Plaintiff has failed to prove that there is a likelihood of success on the merits, in that:

"(a) plaintiff had no private right of action under 18 U. S. C. § 610;

"(b) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder are not 'contributions or expenditures' within the meaning of 18 U. S. C. § 610;

"(c) the expenditures made by Bethlehem Steel in connection with the advertisement, the speech and the folder are not 'expenditures' made for 'the purpose of influencing the nomination for election, or the election of any person to Federal office' and hence, are not 'expenditures' within the meaning of 18 U. S. C. § 591 (f)(1);

"(d) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder did not constitute 'active electioneering directed at the general public on behalf of a candidate in a Federal election' as defined in the legislative history to the recent amendment of 18 U. S. C. § 610; Congressional Record, November 30, 1971, H 11477, 11478;

"(e) to enjoin the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder would prevent a corporation from seeking an honest campaign and election and refuting a statement made by an unidentified candidate, which is adverse to its interest, thereby giving rise to grave First Amendment issues;

"(f) under the facts and circumstances of this case, 18 U. S. C. § 610 must be narrowly construed to avoid an overbroad application infringing on a corporation's (and labor union's) First Amendment right to seek an honest campaign and to refute statements on issues of crucial concern to it and to the public, thus preventing a public debate on such issues."

4. Appeal of District Court's Denial of Injunctive Relief.

Ash appealed to the Court of Appeals for the Third Circuit which, after oral argument, affirmed, *per curiam*, the order of the District Court denying his motion for a preliminary injunction. *Ash v. Cort*, 471 F. 2d 811 (3d Cir. 1973). Ash's Petition for Rehearing was denied by the Court of Appeals on January 31, 1973.

5. The District Court's Grant of Summary Judgment for Petitioners.

Petitioners moved in the District Court to require the posting of a bond for security for expenses, and on March 7, 1973, the District Court entered an Order granting the motion for security for expenses with regard to the cause of action under Delaware law, alone, directing Ash to post a bond within ten days in the amount of $35,000 as security for expenses. At the same time, the District Court granted Ash leave to amend the complaint by eliminating the claim under Delaware law set forth in Count II of the complaint, which Ash did on March 19, 1973.

Petitioners thereafter moved for summary judgment on the federal claim in Count I based on 18 U. S. C. § 610, on the grounds (1) that a stockholder has no private right of action for alleged violations of § 610, (2) that § 610 is inapplicable as a matter of law to the stipulated facts of the case, and (3) that § 610 is unconstitutional.

On July 11, 1973, the District Court entered an Order granting Petitioners' motion for summary judgment.

Ash appealed from the District Court's Order of July 11, 1973, granting Petitioners' motion for summary judgment.

6. Appeal of Judgment for Petitioners.

A panel of the Court of Appeals on April 16, 1974, reversed the judgment of the District Court in an Opinion written by Chief Judge Seitz for the majority. In a scholarly Opinion, Judge Aldisert dissented, stating that the holding of the majority, "implying" a private right of action, can be arrived at "only by defying the Supreme Court's recent decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, — U. S. — (42 U. S. L. W. 4132, January 9, 1974 (*Amtrak*)."

Noting the conspicuous absence in Title II of the FECA of any civil remedy, public or private, in contrast with the supplemental civil remedy expressly provided by Congress in Title III of the FECA, Judge Aldisert stated (*infra*, p. A29):

> "I am persuaded that this is a classic case for the application of Amtrak's second principle which teaches: 'when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.' A legislative schema expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar 'principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*' "

The dissent points out (*infra*, p. A26) that there is "no language in the Act manifesting Congressional intent to create a private right of action by implication" and (*infra*, p. A27) that "appellant conceded at oral argument that the Congressional history is devoid of any reference to a private civil remedy".

The majority of the panel concluded that there exists an "implied" private, civil right of action for violation of § 610, in addition to the criminal sanction, (i) in the absence of any manifestation of intent in the language of the Act and the absence of any legislative history evidencing Congressional intent to imply authorization for such a private right of action, and (ii) in spite of the grave doubts concerning the constitutionality of § 610 expressed in the opinions of this Court in *United States v. C. I. O., supra*, and *United States v. International Union United Auto Workers, supra*, and (iii) in the face of the clear inference of Congressional intent not to create a private right of action, to be drawn from the conspicuous absence of a private remedy in Title II, as contrasted with Title III, of the Act.

Petitioners filed a petition for rehearing and suggestion of rehearing *en banc*, which was denied by the Court of Appeals without opinion on May 15, 1974. Petitioners filed a motion for stay of mandate pending application to this Court for a Writ of Certiorari, which stay the Court of Appeals, by order dated May 22, 1974, granted until June 21, 1974.

Petitioners hereby state, pursuant to Rule 33(2)(b) of this Court, that the provisions of 28 U. S. C. § 2403 may be applicable and that no Court below has, pursuant to 28 U. S. C. § 2403, certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn in question in these proceedings.

REASONS FOR GRANTING THE WRIT.

I. The Court Below Ignored Controlling Decisions of This Court on the Criteria Governing the Implication of Private Remedies From Federal Penal and Regulatory Statutes Not Expressly Providing for Such Remedies.

The Federal Election Campaign Act of 1971, 86 Stat. 3, which embodies 18 U. S. C. § 610, is a comprehensive statutory scheme which creates a complex and detailed administrative procedure for monitoring and regulating federal election campaigns. The Act delegates to various election supervisory officers and to the Department of Justice the responsibility for implementing and enforcing its specific provisions regarding limitations on campaign expenditures, registration and reporting requirements for political committees and disclosure of federal campaign funds. Pursuant to the authority conferred by the Act, a comprehensive set of regulations has been promulgated, implementing in greater detail the requirements of the Act. 11 C. F. R. §§ 1-21.1 and Supplements A and B thereto.

Title II of the Act sets forth amendments to criminal statutes contained in Title 18 of the United States Code relating to federal elections, including 18 U. S. C. § 610.

Title III of the Act expressly provides a civil remedy in addition to the criminal sanctions contained in Title III. Section 308(d)(1)-(5) of Title III, 2 U. S. C. § 438(d)(1)-(5), expressly provides the exclusive method of private enforcement of the provisions of Title III of the Act, by providing that "any person who believes a violation of [Title III] has occurred may file a complaint with the supervisory officer." Upon complaint, the supervisory officer investigates and if, in the judgment of the supervisory officer, any person has engaged in or is about to engage in

any acts or practices in violation of any provision of Title III, the statute directs that the Attorney General "*shall* institute a civil action for relief" including injunctive relief.[2]

The civil remedy thus provided supplements the penal provision of that Title, section 311, 2 U. S. C. § 441. See also 11 C. F. R. §§ 20.10 and 20.11.

In dramatic contrast with Title III of the Act, Title II, which includes 18 U. S. C. § 610, contains no such authorization for a civil remedy to supplement the criminal sanctions expressly provided in Title II.

By the well established principle of *expressio unius est exclusio alterius,* it follows that where Congress expressly provides a particular way of redressing violations of a Congressional enactment, other methods are not to be implied. The Court of Appeals erred, therefore, in "implying" a private civil remedy supplementing the criminal sanction expressly provided. In so holding, the majority of the Court below ignored *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* — U. S. —, 42 U. S. L. W. 4132 (Opinion filed January 9, 1974) (the "Amtrak" case); *Calhoon v. Harvey,* 379 U. S. 134 (1964); and *T. I. M. E., Inc. v. United States,* 359 U. S. 464 (1959), each of which held that where Congress has expressly provided a particular type of civil remedy in one title of an act, but not in a second title of the act, the inference to be drawn is that Congress did not intend to create a civil remedy in the title in which it did not expressly provide one.

The Court below concluded that Ash, as a stockholder and voter, was within the class of beneficiaries of the Act, and therefore that implication of a supplemental civil right of action was appropriate, citing *J. I. Case Co. v. Borak,*

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2. Emphasis supplied throughout, unless otherwise stated.

377 U. S. 426 (1964). However, this basis was rejected in the *Amtrak* case, where this Court said:

> "It goes without saying, however, that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.
>
> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U. S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act." 42 U. S. L. W. at 4134.

The principle has long been recognized by this Court. *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 720 (1967); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246 (1951); *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 301 (1943).

While any rule of statutory construction can undoubtedly be overridden in particular circumstances, such rules play a necessary role in construing statutes and should not be disregarded unless there is definite indication of contrary legislative intent.

There is no such indication of contrary legislative intent in this case. The majority below points to no feature of the language or structure of the Act itself in support of its conclusion. It was, moreover, conceded in the Court below by Respondent that there is no manifestation in the legislative history of any legislative intent to provide a private right of action for violations of § 610.

In the conceded absence of any such Congressional intent, the decision of the Court below to "imply" a private cause of action is an act of pure judicial legislation the reversal of which is required by the application of the *Amtrak* principle.

II. In View of the Doubtful Constitutionality of § 610, the Court Below Erred in Expanding the Scope of Remedies Under the Statute Beyond Those Expressly Provided.

This Court has twice questioned the constitutionality of § 610 in cases presenting the issue of the legality of expenditures for advertising. *United States v. C. I. O.*, 335 U. S. 106 (1948); *United States v. International Union United Auto Workers*, 352 U. S. 567 (1957). In a recent case involving the "contribution" aspect of the statute's prohibition, the constitutionality of § 610 was expressly pretermitted. *Pipefitters v. United States*, 407 U. S. 385, 400 (1972). The constitutional infirmities of § 610 are underscored in the concurring opinion of Mr. Justice Rutledge in *United States v. C. I. O., supra*, and in the dissenting opinion of Mr. Justice Douglas in *United States v. International Union United Auto Workers, supra*.

The question of implication of an additional, private remedy, not expressly authorized by statute, for alleged

violation of § 610 necessarily draws into play "the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred." *United States v. C. I. O., supra,* 335 U. S. at 120-121; *Knights Templars' & Masons' Life Indemnity Co. v. Jarman,* 187 U. S. 197, 205 (1902). Consideration of this principle compels the conclusion that § 610 should be narrowly construed to avoid the constitutional issues lurking in the vague and overbroad language of this statute restricting fundamental constitutional freedoms. As this Court said of § 610 in *United States v. C. I. O., supra,* 335 U. S. at 120-121:

> "From what we have previously noted, it is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgement of the freedoms of the First Amendment. It did not want to pass any legislation that would threaten interferences with the privileges of speech or press or that would undertake to supersede the Constitution. The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality."

The decision of the Court of Appeals in this case violates this fundamental axiom of statutory construction and ignores the obligation it entails. Instead, the Court of Appeals has adopted a construction of § 610 which expands its coverage to subsume *additional* remedies not authorized by statute. In reversing the District Court, over a vigorous dissent, the Court below has rejected a construction of § 610 which would restrict the scope of remedies for violation of

§ 610 to those expressly provided by Congress and thereby avoid the necessity of a decision on the constitutionality of this important legislation governing the conduct of federal election campaigns.

The decision of the Court below places § 610 on a collision course with the First and Fifth Amendments, and the consequences of that decision can only be averted by review in this Court.

III. This Court Should Settle a Critical Question of Statutory Construction Involved in the Administration and Enforcement of the Federal Election Campaign Act of 1971, on Which the Circuits Are Split.

The Court below concluded that § 610 might be applicable to the Advertisement involved in the present case even though the Advertisement does not so much as mention the name of any political party or the name of any candidate for election to federal office.

In adopting this construction, the Court of Appeals again violated fundamental principles of statutory construction by selecting the very construction, among equally obvious alternatives, which gives rise to grave questions concerning the constitutionality of § 610 and by ignoring the basic axiom that criminal provisions are to be strictly construed. Making expenditures for political speech a crime is a constitutionally dangerous enterprise. The decision below has given such a sweeping connotation to the term "expenditure" in § 610 that the demarcation between criminal speech and legal speech is now impossibly beclouded, thereby aggravating the constitutional infirmities of the "expenditure" provision of § 610.

The construction of § 610 by the Court of Appeals for the Third Circuit in this case places it in direct conflict with the Second and Ninth Circuits on the proper scope of the term "expenditure", as used in § 610 and the FECA.

In remanding *United States v. International Union United Auto Workers, supra,* for trial, instead of passing on the constitutional issues presented, this Court stated that one of the central questions bearing on the ultimate decision on the constitutionality of §610 as applied to the advertising in that case was "Did [the advertising] constitute *active electioneering* or simply state the record of particular candidates on economic issues?" 352 U. S. at 592. From this passage of the Court's opinion, the lower courts have developed, in a line of decisions without exception until the decision in the present case, a test for determining the legality of expenditures for advertising under §610. Under this unbroken series of precedents construing §610, only advertising in the nature of "active electioneering" is deemed illegal under §610. *United States v. Lewis Food Co.*, 366 F. 2d 710 (9th Cir. 1966), *reversing*, 236 F. Supp. 849 (C. Div. S. D. Cal. 1964), *on remand from* 381 U. S. 908 (1965); *United States v. Anchorage Central Labor Council*, 193 F. Supp. 504, 507 (D. Alaska 1961); cf. *United States v. National Committee for Impeachment*, 469 F. 2d 1135 (2d Cir. 1972). In *United States v. National Committee for Impeachment, supra,* the Government sought injunctive relief against the defendants who had placed a two-page advertisement in the "New York Times" entitled "A Resolution To Impeach Richard M. Nixon as President of the United States." The advertisement printed the names of Congressmen who had endorsed the proposed resolution as an "Honor Roll", and in the following language solicited funds to be used for political purposes:

> "The National Committee For Impeachment will devote its resources in funds and publicity in aid of any new candidate for election to the House of Representatives or re-election of an incumbent Member, whether in a primary contest or the actual election contest, whether Republican, Democrat, Independent, or a new party, in the order in which their names are officially printed in the Congressional Record. * * *"

The Court of Appeals for the Second Circuit rejected the Government's contention that the expenditure for the advertisement qualified as an "expenditure" under §301 of the FECA and made the advertisers a "political committee" within the meaning of §301, thus subjecting them to the reporting requirements of Title III of the Act. It was held that the definition of "expenditure" in Section 301 of the FECA, which closely parallels the definition of that term in Section 201 of the Act, 18 U. S. C. §591(f)(1), and used in 18 U. S. C. §610, does not encompass expenditures for advertising which derogates the stand taken by a particular candidate on any question.[3]

3. The Court of Appeals for the Second Circuit outlined what it saw as the "abhorrent" consequences of the contrary view, adopted now by the Court of Appeals for the Third Circuit:

> "We dispose more readily of the Government's suggestion that the Act applies to the National Committee because—quoting from the affidavit supporting its motion for a preliminary injunction—'With respect to the upcoming election for President and Vice-President of the United States, the National Committee derogates President Nixon's stand on a principal campaign issue—the Vietnam war.' On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with. Such a result would, we think, be abhorrent; the Government fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributions, or the like. On the Government's thesis every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a Golden Age Club promoting 'senior citizen' rights' would fall under the Act. The dampening effect on first amend-

In *United States v. Lewis Food Company*, 236 F. Supp. 849 (S. D. Cal. 1964), the District Court dismissed an indictment under § 610 which charged that the defendant corporation had made expenditures totalling $9,523.68 to publish an advertisement entitled "Important Notice to Voters" in at least fourteen newspapers. The advertisement in question listed by name 2 United States Senators, 30 members of the House of Representatives, 40 California State Senators, and 80 California State Assemblymen, stating each legislator's political party affiliation. Opposite each legislator's name appeared a "rating" expressed as a percentage, which the text of the advertisement explained showed "the percentage of his votes cast in favor of constitutional principles." The advertisement stated that "100% is perfect." Twenty-eight legislators identified as Democrats received scores of 0. No legislator identified as a Republican received a score of 0.

It was held that the indictment did not state an offense under § 610 because the advertisement did not constitute "active electioneering." 236 F. Supp. at 853.

This Court remanded the Government's appeal of the dismissal to the Court of Appeals for the Ninth Circuit, 381 U. S. 908 (1965). Although the Court of Appeals reversed, *United States v. Lewis Food Company*, 366 F. 2d 710 (9th Cir. 1966), the Government conceded, and the Court of Appeals held, that an expenditure for advertising does not fall within the purview of § 610 unless the advertisement is in the nature of "active electioneering." 366 F. 2d at 712.

The decision of the Court of Appeals for the Third Circuit in the present case, holding that even an expendi-

3. (Cont'd.)
ment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable." 469 F. 2d at 1142 (footnote omitted).

ture for advertising which makes no mention of a political party or of a candidate for federal election may fall within the wide dragnet of § 610, squarely conflicts with the narrow construction adopted by the Second and Ninth Circuits and with the "active electioneering" test.

This Court should grant certiorari to resolve the conflict among the circuits regarding this important question of statutory construction, central to the nationwide administration and enforcement of the federal election laws. Doubt should not be permitted to remain as to the scope of § 610's prohibition of political speech. The present uncertainty of the law on this frontier of constitutional law has a chilling effect on the exercise of constitutionally protected activities which this Court should remove.

IV. The Questions Involved Are of Exceptional Importance.

Because of the decision of the Court of Appeals, implying a private right of action from § 610, this case again presents the important issues concerning the construction and constitutionality of a vital component of the federal election laws which were before this Court in *United States v. C. I. O., supra*, and *United States v. International Union United Auto Workers, supra*. What rides in the balance of this case is no less than the depth of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U. S. at 270-271 (1964). The issues involve not only the right of expression, but the right of citizens to have access to the views of every group in the community. What Mr. Justice Douglas said in *United States v. International Union United Auto Workers, supra*, 352 U. S. at 593, remains true today:

"We deal here with a problem that is fundamental to the electoral process and to the operation of our democratic society. It is whether a union can express its views on the issues of an election and on the merits of the candidates, unrestrained and unfettered by the Congress. The principle at stake is not peculiar to unions. It is applicable as well to associations of manufacturers, retail and wholesale trade groups, consumers' leagues, farmers unions, religious groups and every other association representing a segment of American life and taking an active part in our political campaigns and discussions. It is as important an issue as has come before the Court, for its reaches the very vitals of our system of government."

V. Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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JEROME R. RICHTER,
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Four Penn Center Plaza,
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APPENDIX A.

Order of the Court of Appeals Granting Appellees' Motion for Stay Pending Application for a Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH, ETC.,

v.

STEWART S. CORT., ET AL.

RICHARD A. ASH, *Appellant.*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 21, 1974.

/s/ COLLINS J. SEITZ,
Chief Judge.

Dated: May 22, 1974

APPENDIX B.

Order of the Court of Appeals En Banc Denying Appellees' Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION,

v.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, ET AL.,
Appellees,

and

BETHLEHEM STEEL CORPORATION,
Nominal Defendant,

RICHARD A. ASH,
Appellant.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by APPELLEES in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ COLLINS J. SEITZ,
Judge.

Dated: May 15, 1974

APPENDIX C.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RE: RICHARD A. ASH

PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104
ON BEHALF OF HIMSELF,
AND ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS,

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION
AND
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
Nominal Defendant,

RICHARD A. ASH,
Appellant.

(D. C. CIVIL No. 72-1925)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and HASTIE and ALDISERT, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed July 11, 1973, be, and the same is hereby reversed and the matter is remanded for further proceedings consistent with this opinion. Costs taxed against appellees.

ATTEST:

/s/ THOMAS F. QUINN,
Clerk.

April 16, 1974

APPENDIX D.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF of BETHLEHEM STEEL CORPORATION,

v.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS AND GEORGE P. JENKINS, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION,

Appellees,

and

BETHLEHEM STEEL CORPORATION,
Nominal Defendant

RICHARD A. ASH,

Appellant

(D. C. Civil Action No. 72-1925)
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 17, 1974

Before SEITZ, *Chief Judge*, HASTIE and ALDISERT, *Circuit Judges.*

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1612 Latimer Street
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Of Counsel:
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OPINION OF THE COURT.

(Filed April 16, 1974)

SEITZ, *Chief Judge.*

Plaintiff, a stockholder in Bethlehem Steel Corporation and registered to vote in federal elections, appeals from an order of the District Court for the Eastern District of Pennsylvania denying his request for an evidentiary hearing and granting defendants' motion for summary judgment. Defendants are directors of Bethlehem. The gravamen of plaintiff's complaint is that defendants caused Bethlehem to expend money to help secure the election of the Republican party's 1972 presidential candidate.

Plaintiff asserts that the corporate expenditures, for an advertisement and a pamphlet, violated a federal prohibition on corporate campaign spending, 18 U. S. C. § 610 (1970) as amended (Supp. II 1972). Plaintiff, seeking an injunction and damages, invokes federal jurisdiction over this claim under 28 U. S. C. § 1331 (1970), making the requisite jurisdictional allegations.

The district court's order granting summary judgment merely recited that no material factual dispute existed and that defendants were not liable to plaintiff for the claimed violation of federal law. We presume that this assertion was bottomed on the findings and conclusions relied upon by the district court to support its earlier denial of a preliminary injunction. See 350 F. Supp. 227 (E. D. Pa. 1972). Defendants argue on appeal the propriety of those findings and conclusions and urge that the summary judgment be affirmed on that basis. The major points of the district court's decision are that plaintiff would have no cause of action from defendants' violation of 18 U. S. C. § 610 (1970), as amended (Supp. II 1972), and that, in any event, defendants did not violate § 610.

I.

Before addressing the points urged by defendants to justify and plaintiff to attack summary judgment, we must consider two matters of justiciability.

Mootness

In affirming the district court's earlier denial of a preliminary injunction, we limited our decision narrowly, holding only that the court's finding of no irreparable harm to plaintiff from denying the injunction was not clearly erroneous. 471 F. 2d 811 (3d Cir. 1973). At that time, however, we noted that the question of mootness

would have to be examined at a later point in these proceedings. *Id.* at 812. As originally drawn, plaintiff's complaint focused on the 1972 presidential election and sought to prevent corporate expenditures from influencing that election. That election is now history. Nonetheless, plaintiff alleges that defendants intend to make similar expenditures in future elections, and defendants, far from denying this, hotly defend their right to do so.

Controversies concerning elections often have presented mootness problems. See, e.g., *Hall v. Beals,* 396 U. S. 45 (1969); *Moore v. Ogilvie,* 394 U. S. 814 (1969). These problems arise since election controversies almost always are spawned shortly before the election, seek prospective relief directed to the election, and reach appellate courts only after the election. Where the basis of such a controversy remains after an election and where the dispute is likely to recur, the case will not be found moot, even where prospective relief alone is sought. *Moore v. Ogilvie, supra* at 816. When this case was before us on appeal of the preliminary injunction denial, the complaint asserted pendent federal jurisdiction over a claim arising under state law; although the complaint was ambiguous, it apparently sought injunctive relief for defendants' alleged violation of federal law and, on behalf of the corporation, damages for the claimed state law violation. Our concern with mootness arose in this context.

Were plaintiff's federal claim pressed solely to secure injunctive relief, we would be required to determine whether plaintiff's bare allegation of defendants' intention to make future similar expenditures would support review, given no showing of a consistent pattern of such conduct and no assurance of plaintiff's continued ownership of Bethlehem stock. After proceedings resumed in

the district court, however, the plaintiff amended this complaint and now clearly demands, in addition to injunctive relief, damages on behalf of the corporation for violation of § 610.[1] Even if plaintiff has no live claim for injunctive relief, the dispute over damages renders this controversy justiciable. See *Powell v. McCormack,* 395 U. S. 486, 495-500 (1969). We need not decide whether plaintiff's claim would be moot if he did not seek damages as well as an injunction.[2]

Question also is raised concerning plaintiff's standing to prosecute this action. As a constitutional matter, all that is required for standing is that the plaintiff have been personally injured or be threatened with such injury and that the injury be directly related to plaintiff's legal claim. *Flast v. Cohen,* 392 U. S. 83, 101 (1968); *Baker v. Carr,* 397 U. S. 186, 204 (1962). Plaintiff alleges economic injury, as a stockholder whose interest in Bethlehem is worth less than it would be had defendants not caused the challenged expenditures to be made, and further injury as a citizen and

1. Plaintiff in his amended complaint has dropped the allegations contained in the state law count of his original complaint. One allegation from the federal count of the original complaint and carried over verbatim in the amended version, however, declares, without elaboration that defendants violated both state and federal law. Defendants, presuming that plaintiff thus had not abandoned his state claim, moved for summary judgment on the federal claim and dismissal of plaintiff's pendent state claim for want of jurisdiction following judgment for defendants on the only federal matter. The district court does not mention plaintiff's state claim, but merely grants defendants' motion. We assume that if plaintiff did not abandon his state law claim, the district court's order dismissed that claim for want of federal jurisdiction but do not reach the dismissal's propriety.

2. Since the controversy between plaintiff and defendants is not moot, the viability of plaintiff's claim for injunctive relief must be determined, if plaintiff prevails on the merits, according to settled principles controlling the district court's discretion to grant or withhold injunctive relief. *See* J. Moore, 7 Moore's Federal Practice Para. 65.18[3] (2d ed. 1969).

voter whose ability to secure a responsive federal government has been lessened. While these injuries, tangible and intangible, may be small, they are personal to plaintiff, directly related to his claim, and may be remedied by the injunctive and damage relief sought; hence they are sufficient to support plaintiff's standing. See *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U. S. 669, 685-89 (1973), and cases cited *id.* at 689, n. 15.

Plaintiff's standing is not defeated by the fact that his injuries are shared by countless others. Although the Supreme Court's language in *Frothingham v. Mellon,* 262 U. S. 447, 487 (1923), indicated that an injury to many might confer standing to none, *Flast* intimates that *Frothingham* stated policy, not constitutional dogma, *Flast v. Cohen, supra* at 93-94, and *SCRAP* declared that standing is not lost because the harm asserted is universally shared, *United States v. SCRAP, supra* at 686-88. Finally, because we are asked not to review administrative action but to adjudicate private rights, we need not determine whether the statute asserted to provide plaintiff's cause of action places him outside the class permitted to invoke our processes. Cf. *Davis v. Romney,* Nos. 73-1249 & 73-1420, slip. op. at 3-5 (3d Cir. 1974); compare *Flast v. Cohen, supra* at 101-06, and *Baker v. Carr, supra* at 204-08, with *Sierra Club v. Morton,* 405 U. S. 727, 733 (1972), and *Association of Data Processing Service Organizations v. Camp,* 397 U. S. 150, 153-54 (1970). Alleging personal injury from defendants' violation of a federal statute, plaintiff may invoke our jurisdiction under 28 U. S. C. § 1331 (1970); questions of statutory construction will be met in determining whether plaintiff has stated a cause of action and in ruling on the merits of his claim.

II.

The district court's decision that defendants were entitled to judgment as a matter of law rested on several legal conclusions, among them that plaintiff failed to state a cause of action. Plaintiff relies upon 18 U. S. C. § 610 (1970), as amended (Supp. II. 1972), as providing his cause of action. Section 610, *inter alia*, makes it "unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with any [federal] election . . .," and provides criminal penalties for its violation. Plaintiff contends that, although it expressly provides only penal sanctions, § 610 "implies" a cause of action in his favor.

Standards for Implied Cause.

To find a cause of action "implied" in a statute, we must determine (1) that the provision violated was designed to protect a class of persons including the plaintiff from the harm of which plaintiff complains and (2) that it is appropriate, in light of the statute's purposes, to afford plaintiff the remedy sought. *Bivens v. Six Unknown Named Agents*, 403 U. S. 388, 395-97 (1971); *Wyandotte Co. v. United States*, 389 U. S. 191, 200-02 (1967); *J. I. Case Co. v. Borak*, 377 U. S. 426, 431-35 (1964). Finding an implied cause pursuant to these criteria is not entirely an exercise in divining legislative intent. Certainly, legislative intent is relevant; where the legislature clearly has indicated its intent to grant or withhold a cause of action, implicitly or explicitly, courts will give effect to that intent. E.g., *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 42 U. S. L. W. 4132, 4134-35 (U. S. January 9, 1974). Absent some reasonably clear indication of legislative attention to the possible creation of a cause of action, however, courts ascertain the policies underlying the substantive law and determine the propriety, as a means

of effectuating those policies, of affording litigants a particular remedy. *Bivens v. Six Unknown Named Agents*, *supra* at 395-97 (opinion of the Court), and 402-03, n. 4 (Harlan J., concurring); *Holloway v. Bristol-Meyers Corp.*, 485 F. 2d 986, 989-99 (D. C. Cir. 1973).

We are urged to find that this process of judicial policy consideration to determine whether an "implied" cause of action can be asserted was rejected by the Supreme Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra* (hereinafter "*Amtrak*"). Relying on the maxim *expressio unis est exclusio alterius* [expression of one thing is exclusion of others], the Court declared in *Amtrak* that ". . . when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Id.* at 4134. This rule of statutory construction does not alter the process used to determine if a cause should be inferred in the absence of statutory language indicating legislative intent; rather, it aids the court merely in determining when legislative intent to preclude a remedy can be fairly implied.[3]

For the *Amtrak* rule to apply, the statute must expressly provide the plaintiff a remedy that may logically be said to be exclusive. In *Amtrak*, the remedy expressly provided to correct the harm of which plaintiffs complained was a civil action prosecuted by the Attorney General. 45 U. S. C. § 547 (1970). In the instant case, no express civil

3. The extent to which the Supreme Court relied on the rule of statutory construction in *Amtrak* is unclear. After announcing the rule, the Court went on to find evidence of a clear legislative intent to withhold the remedy sought, National R. R. Pass. Corp. v. National Ass'n of R. R. Pass., 42 U. S. L. W. 4132, 4134-35 (U. S. Jan. 9, 1974); the Court also examined the policies, as it conceived them, behind the "Amtrak Act", Railroad Passenger Service Act of 1970, 45 U. S. C. §§ 501, *et seq.* (1970), and found that implication of a private remedy there would be inconsistent with those policies, *id.* at 4135-36.

action is provided to remedy plaintiff's, or any other, alleged injury.[3a] Only a criminal sanction is expressly provided for violation of § 610. Courts have consistently held that statutes providing for criminal liability do not preclude assertion of private causes of action. E.g., *Wyandotte Co. v. United States, supra* at 200-02; *Texas & Pacific Railway Co. v. Rigsby,* 241 U. S. 33, 39-41 (1916). In *Rigsby* the Supreme Court, inferring a private cause of action for violation of a criminal provision, distinguished "remedial" from "penal" application of a statute. *Id.* at 41. Thus, since § 610 cannot be said to provide any remedy for the alleged harm to plaintiff here, *Amtrak* would not preclude finding an implied cause.

Statutory Design.

Our inquiry, then, must be, first, whether § 610 was designed to protect plaintiff from the harm he alleges. Section 610 is the end-product of a series of enactments limiting campaign giving and spending. See *United States v. UAW,* 352 U. S. 567, 570-84 (1957). In discussing the

3a. Judge Aldisert notes that, in contrast to title II of the Federal Election Campaign Act of 1971, amending *inter alia* § 610, title III expressly provides a civil cause of action to the Attorney General. This provision referred to by Judge Aldisert allows the Attorney General to institute a civil action for violation of certain reporting and disclosure requirements imposed on candidates and campaign committees. These requirements were first imposed by the 1971 Act and criminal penalties for their violation were first provided in the 1971 Act.

Provision of this civil remedy may well bar inference of a private remedy for violation of these reporting and disclosure requirements. We do not, however, believe that any intent to bar the remedies sought here can be inferred from the 1971 Act's grant of a civil, as well as a criminal, action for violation of conduct first proscribed in 1971 and its failure to grant any civil remedies for conduct prohibited since 1907. Amtrak certainly does not require that such an inference be drawn from the 1971 Act's amendment of longstanding criminal provisions coincidentally joined, albeit in separate titles, with promulgation of new civil and criminal actions.

seminal federal limitation on corporate campaign contributions, carried forward into the present § 610, the Supreme Court stated that it was "motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials have no moral right to use corporate funds for contribution to political parties without the consent of the stockohlders." *United States v. CIO,* 335 U. S. 106, 113 (1948) [footnotes omitted].

As a voter and citizen, plaintiff is within the class Congress sought to protect by prohibiting corporate expenditures in campaigns for federal office; Congress, in the various enactments embodied in § 610, declared its view that such expenditures reduced the ability of voters to secure a government responsive to their wishes and increased the likelihood of governmental actions favorable to particular economic blocs but inimical to the general welfare. *Id.;* 117 Cong. Rec. 43379-81 (1971) (remarks of Congressman Hansen).

As a stockholder, plaintiff is within the class secondarily protected by § 610, which keeps control over political contributions in his hands and not in those of corporate managers or directors. *Id.;* 117 Cong. Rec. 43384-85 (remarks of Congressman Thompson). The harm to plaintiff as a voter and citizen, while not set forth explicitly in his complaint, is presumably the intangible harm foreseen by Congress. The alleged harm to plaintiff and other Bethlehem stockholders is the loss of over one-half million dollars from the corporation's treasury for the challenged expenditures.[4] Clearly plaintiff satisfies that first require-

4. In focusing on the harm to plaintiff and the propriety of according him a remedy, we are aware that damages are sought not for plaintiff as an individual stockholder but, in the form of a derivative action, for all injured stockholders. Where stockholders suffer in-

ment for determining a cause of action to be implied in § 610.

Defendants contend, however, that Congressional intent to protect voters, citizens and stockholders does not satisfy the implied cause test. First, defendants argue that § 610 primarily protects not voters and citizens but the public in general and that a cause of action will only be implied to protect members of a specific, limited class. We reject defendants' argument that provisions designed for the protection of the entire American public cannot give rise to implied causes. See *Bivens v. Six Unknown Named Agents, supra* (finding a private cause of action implied in the Fourth Amendment's protection of "[t]he right of the people to be secure . . . against unreasonable searches and seizures . . . ."). The breadth of the protected class is, however, relevant to the propriety of allowing criminal sanctions, rather than private actions, to enforce a statutory prohibition and will be considered below.

Second, defendants argue that no cause of action may be implied to protect plaintiff *qua* stockholder because such protection was only a secondary purpose of § 610. Although it may be improper to infer a cause of action from a statute only incidentally protecting plaintiff, the Supreme Court has indicated that protection of stockholders was not merely an incidental purpose of § 610, *United States v. CIO, supra* at 113, and protection of plaintiff need not be the act's primary purpose. See *J. I. Case Co. v. Borak, supra* at 431-32; cf. *Wyandotte Co. v. United States, supra. Propriety of Private Action.*

In determining the propriety of affording plaintiff a cause of action for violation of § 610, we must ascer-

4. (Cont'd.)
jury jointly from violation of federal rights, a derivative action may be an implied remedy. *See* Drachman v. Harvey, 453 F. 2d 722, 736-38 (2d Cir. 1972) (in banc).

tain whether such a remedy will effectuate the act and whether any "collateral" considerations counsel withholding this remedy. Since the purpose of the section is to prevent certain expenditures, allowing suit to enjoin or recover such expenditures would seem to be consistent with accomplishment of § 610's goal. Although the breadth of § 610's coverage favors enforcement solely by criminal sanction to avoid a multiplicity of possible suits challenging intangible public harm,[5] the intent to protect many people from many possible violations also favors individual suits to enforce the act as the number of putative defendants, committing acts more likely to be covert than notorious, is so great that government enforcement alone might prove insufficient, cf. *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F. 2d 649, 651 (3d Cir. 1967). We note that stockholders, able to protect their investments by recovering damages on behalf of the corporation, may be expected to be particularly vigilant in detecting violation of § 610.

The nature of the prohibited conduct further supports provision of private remedies. Contributions or expenditures to influence federal elections are prohibited; yet the politician whose election is facilitated by violation of § 610 may be in charge of the statute's enforcement. This possible conflict of interest is not simply hypothetical; plaintiff alleges that in the instant case non-enforcement of § 610 by the Justice Department was due to the Department's control by the candidate defendants supported.[6]

5. This objection pertains to suits by non-stockholder citizens. Here, of course, plaintiff sues not only as a citizen and voter but also as a stockholder of the allegedly offending corporation, a narrower class suffering tangible harm. We recognize also that the number of putative § 610 plaintiffs would be much smaller where, for instance, a Congressional rather than Presidential election is involved.

6. Among reasons cited by the district judge for concluding that plaintiff lacked a cause of action was his willingness to "assume the

The relative expeditiousness possible in civil, contrasted with criminal, proceedings also supports implication of a cause here. The section's primary focus is on preventing the corruption of elections by corporate contributions. Violations of § 610 are, we presume, most likely to occur in the period immediately preceding an election, and, given the delays incident to criminal investigation and grand jury indictment as well as trial, the election may well be over before the section's violation is determined. Private enforcement, particularly by injunction, can be relatively swift.

We note no countervailing reason for denying private remedies here. The matter before us involves none of the "special circumstances" discussed in *Borak* as counseling denial of a private cause of action. See *J. I. Case Co. v. Borak, supra* at 396-97. Nor does § 610 involve the operation of a regulatory agency whose policy determinations on this or other matters might be threatened by allowing private enforcement. See *Holloway v. Bristol-Meyers Corp., supra* at 990-92, 997-1002. Thus, we find allowance of a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief, proper to remedy violation of § 610.[7]

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6. (Cont'd.)
partisan enforcement of the Act as plaintiff suggests." 350 F. Supp. at 231. We make no such assumption here. While plaintiff has alleged, and presumably stands ready to prove, partisan enforcement of § 610, our finding of a cause of action is supported simply by the possibility of such enforcement, or non-enforcement—presence or absence of actual partisan enforcement in this case is irrelevant to our determination.

7. The propriety of awarding such relief must depend on the circumstances of each case. We note also that where a non-stockholder plaintiff sues, presumably only for injunctive relief, there may be a question as to the plaintiff's ability to satisfy the $10,000 jurisdictional amount for 28 U. S. C. § 1331 (1970).

III.

The district court concluded, defendants contend rightly, that even if plaintiff were found to have a cause of action under § 610, defendants would be entitled to judgment as a matter of law. 350 F. Supp. at 231-32. The court decided that the meaning of "contribution or expenditure" in § 610 was governed by the definition of those terms in 18 U. S. C. § 591 (1970), as amended (Supp. II 1972); that § 591 requires a purpose to influence the nomination or election of a particular person; and that defendants' advertisements and pamphlets were designed not to influence election of any person but to advocate an honest campaign and "respond to an accusation leveled against the business community." *Id.* Plaintiff contests and defendants support each of these conclusions.

Scope of § 610.

Plaintiff disagrees with judging Bethlehem's expenditures by the § 591 definition of that term, claiming that § 610 contains a more specific definition of the term, which should control here. Section 591, in relevant part, reads:

> When used in sections 597, 599, 600, 602, 608, 610 and 611 of this title—
>
> • • •
>
> (f) "expenditure" means—
>
> (1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . ., made for the purpose of influencing the nomination for election, or election, of any person to Federal office . . . .

Section 610, as pertinent, states that "[a]s used in this section, the phrase 'contribution or expenditure' shall in-

clude any direct or indirect payment . . . to any candidate, campaign committee, or political party or organization . . . . " Corporate communication to stockholders and non-partisan "get-out-the-vote" drives aimed at stockholders and their families are explicitly excluded.

The definition given "expenditure" in both sections traces back to the Federal Election Campaign Act of 1971, P. L. 92-225, Title II, §§ 201, 205, 86 Stat. 3. The drafters clearly intended § 591's definition to affect interpretation of § 610, for they expressly provided that the definitions in § 591 applied to use of those terms in § 610. We note also that § 591 indicates the "meaning" of expenditure while § 610 only indicates certain matters "included" in that term. We therefore read § 610 as supplementing rather than replacing § 591's definition. Nothing specifically included as an expenditure for § 610, however, covers Bethlehem's challenged actions. Thus, it appears that the district court was correct in concluding that Bethlehem's challenged expenditures are not proscribed unless they fall within § 591's definition of "expenditure."

An integral part of § 591's definition of prohibited expenditures is the requirement that they be for the purpose of influencing someone's election to federal office—in other words, § 591 requires a partisan purpose. Plaintiff argues, however, that § 610, by negative implication in its exclusion of only some non-partisan get-out-the-vote drives, makes unlawful other get-out-the-vote drives, even though non-partisan. Plaintiff supports his contention by reference to legislative history.

Several comments by key Congressman in debate over the most recent amendment to § 610 indicate that the section now would prohibit a non-partisan get-out-the-vote drive if financed from a corporation's general treasury and aimed at the general public. See, e.g., 117 Cong. Rec. 43380-81 (remarks of Congressman Hansen), 43381 (remarks of Congressmen Hansen and Hays), 43387-88 (remarks of Congressmen Ashbrook, Hansen and Hays). The debates also indicate that members of Congress had a fairly specific and limited type of activity in mind when speaking of "get-out-the-vote" drives, primarily door-to-door canvassing and escorting people to the polls, see *id.* at 43386 (remarks of Congressman Crane), 43387 (remarks of Congressman Ashbrook), 43388 (remarks of Congressman Hays), and that the primary concerns with such drives were, first, that they were generally non-partisan in name only, and, second, that their partisanship was not often apparent to observers, see *id.* at 43388 (remarks of Congressman Ashbrook), 43390 (remarks of Congressman Steiger).

Application of § 610.

The expenditures challenged here were for activities that would not seem to have the hallmarks of a "get-out-the-vote" drive—Bethlehem's communications were in writing and aimed at the entire public, rather than selected portions, so their partisanship, if any, could be readily determined. We would not, on the present record, find Bethlehem's expenditures for these communications, if non-partisan, to be proscribed by any prohibition on non-partisan get-out-the-vote drives that may be implicit in § 610. We turn to the inclusion or exclusion of these expenditures from the definition of that term in § 591.

The district court found that Bethlehem's expenditures were non-partisan and thus outside the sweep of § 591 and, hence, of § 610. This finding rests on the fact that no candidate or party was named in the corporation's ad and pamphlet. Unless § 591 requires that a candidate or party be named, the district court's grant of summary judgment cannot be upheld; the partisanship of Bethlehem's state-

ments is a factual question as to which the parties are in dispute,[8] and on summary judgment we must accept as true plaintiff's allegation of partisanship. See *Johnson v. Alldredge*, 488 F. 2d 820, 823 (3d Cir. 1973).

Nothing in the language or legislative history supports an interpretation of sections 591 and 610 that would make lawful an expenditure simply because in the communication it paid for no candidate was named. There is no evidence Congress thought the American public so unperceptive that it would recognize a statement as supporting or attacking a particular candidate only by use of his name; such a requirement would eviscerate § 610. Since dispute exists as to a material factual issue, the district court erred in granting summary judgment and denying plaintiff's motion for an evidentiary hearing.

IV.

Defendants contend that § 610 is unconstitutional, urging a variety of grounds. Although defendants do not treat their various constitutional contentions separately, their underlying argument appears to be that, if applied to prohibit non-partisan political speech, § 610 would violate the First Amendment. Because we have decided that § 610 would proscribe Bethlehem's expenditures only if they financed partisan communications, we do not reach defendants constitutional contentions. See *United States v. UAW*, *supra* at 591-92. We note that the district court has never passed on these contentions and that they may be reasserted on remand.

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8. The definition of expenditure in § 591 requires a partisan purpose; we assume here that where a communication is the expenditure's direct product, the partisan purpose must appear from the communications content, viewed in light of surrounding circumstances.

The judgment of the district court is reversed and the matter is remanded for further proceedings consistent with this opinion.

ALDISERT, *Circuit Judge*, dissenting.

Standing in this case does not trouble me. This is not a taxpayer's suit, *Flast v. Cohen*, 392 U. S. 83 (1968), *Frothingham v. Mellon*, 262 U. S. 447 (1923); nor a suit to obtain judicial review of agency action, *United States v. Students Challenging Regulatory Agency Procedures*, 412 U. S. 669 (1973), *Sierra Club v. Morton*, 405 U. S. 727 (1972), *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150 (1970); nor a voter's complaint alleging impairment of his right to vote, *Baker v. Carr*, 369 U. S. 186 (1962). Only the damages aspect of the complaint has survived the mootness of the injunctive request. Thus, the claim is reduced to a garden variety case or controversy in which a plaintiff stockholder asserts economic harm to the corporation for which he has standing derivatively on behalf of the corporation. *Kauffman v. Dreyfus Fund, Inc.*, 434 F. 2d 727 (3d Cir. 1970), *cert. denied*, 401 U. S. 974 (1971).

I have heretofore expressed discomfort with certain decisions of this court regarding standing. *See, United States v. Richardson*, 465 F. 2d 844 (3d Cir. 1972), (Adams, J., dissenting, joined by Aldisert and Hunter, JJ.), and *Schiaffo v. Helstoski*, — F. 2d — (3d Cir., Nos. 72-2167/68, January 4, 1974) (Aldisert, J., dissenting). And I would hope that the district courts and courts of appeals will soon receive definitive guidance in this "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circum-

stances of individual situations. . . .'"[1] The Supreme Court has heard argument in two important standing cases, *United States v. Richardson, supra,* (No. 72-885, argued October 10, 1973), 42 U. S. L. W. 3216, and *Richardson v. Reservists Committee to Stop the War,* (No. 72-1188, argued January 14, 1974), 42 U. S. L. W. 3418.

The standing issue aside, I would affirm the district court because I find that Congress has not provided a civil remedy for the plaintiff expressly or by implication. While an implied right of action may be rationalized with considerable persuasion, this can be done only by defying the Supreme Court's recent pronouncement in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* — U. S. — (42 U. S. L. W. 4132, January 9, 1974) (Amtrak). I see Amtrak to be a definite signal to the courts of appeal and district courts to decelerate use of excerpts from Justice Clark's opinion in *J. I. Case Co. v. Borak,* 377 U. S. 426, 431-432 (1964), to find implied civil remedies not expressly authorized by Congress. Three bright warning lights were flashed in Amtrak:

> 1. "[T]he inference of . . . a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."
>
> 2. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States,* 278 U. S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.*"
>
> 3. "[T]he most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. *Neuberger v. Comm'r,* 311 U. S. 83, 88 (1940)."

42 U. S. L. W. at 4134.

1. *United States ex rel. Chapman v. Federal Power Commission,* 345 U. S. 153, 156 (1953).

I.

Amtrak's first principle, the imperative to ascertain legislative intention, requires that we examine the entire legislative package known as the Federal Election Campaign Act of 1971. This case is brought under Title II of the Act, containing amendments to Title 18 of the United States Code, including 18 U. S. C. § 610. There is no express provision for a civil remedy, public or private, in Title II. By contrast, Title III of the Act authorizes the Attorney General on behalf of the United States to commence a civil action for violation of its subchapter. *See,* 2 U. S. C. § 438 (d)(1)-(5). This public cause of action in Title III supplements the penal provision of that Title, 2 U. S. C. § 441. *See also,* 11 C. F. R. §§ 20.10 and 20.11. In *T. I. M. E., Inc. v. United States,* 359 U. S. 464 (1959), the Court refused to imply a private right of action in favor of shippers under the Motor Carrier Act of 1935, 49 U. S. C. § 316(b) and (d) (Interstate Commerce Act, Part II), for overcharges by certified carriers. The government, as a shipper, brought suit against the carrier contending that this language imposed a statutory duty on motor carriers not to charge or collect other than "reasonable" rates and urged that a cause of action be implied. The Supreme Court refused to imply a cause of action. Noting that the provisions of Part I and III of the Interstate Commerce Act, relating to rail and water carriers, granted a private remedy to ship-

pers, the Court emphasized that similar provisions were conspicuously absent in Part II relating to motor carriers. The Court said that creation of a remedy under these circumstances "would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I." 359 U. S. at 471. I would apply the *ratio decidendi* of *T. I. M. E., Inc.*, to these proceedings.

Further, Congress recently has had occasion to reexamine § 610. In the course of amending this section and enacting the Federal Election Campaign Act of 1971, Congress did not provide a private remedy to supplement the express criminal sanctions.

I detect no language in this Act manifesting Congressional intent to create a private right of action by implication similar to *J. I. Case Co. v. Borak, supra,* and *Texas & Pacific Railway Co. v. Rigsby,* 241 U. S. 33 (1916). I therefore would accept the cogent reasoning of the Tenth Circuit in *Chavez v. Freshpict Foods, Inc.*, 456 F. 2d 890, 895 (10th Cir.), *cert. denied,* 409 U. S. 1042 (1972):

> We recognize that the tripartite classification of governmental powers—legislative, executive and judicial—has no absolutes, and that governmental functions are not easily defined as "legislative", "executive" or "judicial". But in the cases at bar the substantive rights relied upon by the appellants have been promulgated by Congress in the exercise of its power to enact penal statutes. In effect, appellants urge this court, under its classical adjudicative power, to legislate. When Congress was dealing with the subject matter of the statutes here involved, it was capable of clearly and directly providing the rights and remedies urged by the appellants.

II.

I am persuaded that this is a classic case for the application of Amtrak's second principle which teaches: "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." A legislative schema expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar "principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*"

III.

Amtrak's third principle, that statutory construction must yield to clear contrary legislative intent, renews the previous emphasis on Congressional intent. But appellant conceded at oral argument that the Congressional history is devoid of any reference to a private civil remedy. Therefore, we lack any semblance of contrary legislative intent, let alone clear contrary legislative intent.

It seems to me, therefore, that a discussion of the necessity for destroying the influence over elections which corporations exercise through financial contributions and the recognition that corporate officials have no right to use corporate funds improperly, *United States v. C. I. O.*, 335 U. S. 106, 113 (1948), is simply irrelevant to the narrow issue posed by this appeal: whether it can be properly concluded that a private civil right of action may be implied to supplement the penal provisions of Title II. Our polestar is Congressional intention. To imply such a right is to presume that Congress intended to provide for such an action, but overlooked its inclusion when the Federal Corrupt Practices Act was originally enacted, and that Congress overlooked it again when it enacted the comprehensive Federal Election Campaign Act of 1971. I cannot impute

such derelictions to a Congress vitally concerned in a matter so universally discussed and the subject, if not all-consuming, public interest.

The Supreme Court's entreaty for restraint in Amtrak is justified. Otherwise a reasoned case for an implied private right of action could be constructed within the framework of every federal criminal statute simply by showing that plaintiff is "within the class Congress sought to protect by prohibiting" certain conduct. Three comprehensive criminal codes have been introduced in the 93rd Congress: S. 1., "Criminal Justice Codification, Revision and Reform Act of 1973," described by its proponents, Senators McClellan, Ervin, and Hruska, as the lengthiest bill ever introduced in the Senate, exceeding the Internal Revenue Code of 1954; H. R. 6046; S. 1400, "Criminal Code Reform Act of 1973"; and H. R. 10047, reflecting the recommendations of the National Commission on Reform of Federal Criminal Laws, styled "Federal Criminal Code Reform Act of 1973." Every criminal statute is designed to protect some individual, public, or social interest. The criminal statutes define offenses involving danger to the person, against property, against public order, health, safety and sensibilities, as well as offenses against national security, foreign relations, immigration and nationalization, integrity and effectiveness of government operations, internal revenue and customs, civil rights and elections. Is it to be inferred that Congress is also considering an unwritten, but *intended,* comprehensive civil code at the same time? I don't think so.

If the "ambit of protection" test were to be applied to every criminal statute by the court, then it would follow that, given particular circumstances, a remedy could be fashioned to afford civil relief upon the breach of every criminal statute. And thus the federal judiciary, and not

the Congress, would be defining the metes and bounds of federal court jurisdiction. But there is no authority for this, because it is the Congress, and not the federal judiciary, which creates subject matter jurisdiction for the federal courts. *See, Sheldon v. Sill,* 8 How. 440, 12 L. Ed. 1147 (1850); *Ex Parte McArdle,* 7 Wall. 506, 19 L. Ed. 264 (1869).

I am persuaded that the Amtrak court could not fail to notice the plethora of implied civil remedy cases which arose from an unrestricted application of *J. I. Case Co. v. Borak, supra,* and an overgenerous use of Justice Black's overgenerous quotation in *Bell v. Hood,* 327 U. S. 678, 684 (1946), that "federal courts may use any available remedy to make good the wrong done." I am convinced that the Amtrak court consciously and deliberately applied the brakes and meant exactly what it said when it declared that a "private cause of action not otherwise authorized by statute" may not be implied in the absence of clear "evidence of legislative intent."

Although I recognize that the Presidential election of 1972 is a matter of dominant national, sociological and political interest in 1974, an imperative of a detached decisional process commands that neutral principles of construction be employed in all our cases because of the precedential or institutional effect of our determinations. To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code. And to do this is to suggest that for every written volume of Title 18 of the United States Code there is an unwritten volume of Title 28.

Because I cannot begin to accept this notion, I would affirm the judgment of the district court.

APPENDIX E.

The Order of the District Court Granting Summary Judgment.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

ORDER.

AND NOW, this 11th day of July, 1973, upon a finding that the issue whether plaintiff has an implied right to prosecute a cause of action under 18 U. S. C. §610 is a question of law to be determined by the Court based upon, *inter alia*, the language, legislative history and purpose of the Act, IT IS ORDERED that plaintiff's motion for an evidentiary hearing and for continuation of defendants' motion for summary judgment is DENIED. In addition, upon consideration of the entire record, oral argument and briefs submitted by the parties and upon a finding (1) that no legal basis has been presented by the plaintiff to justify the relief sought, and (2) that no genuine issues of material facts exist, IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

/s/ E. MAC TROUTMAN,
J.

APPENDIX F.

The Findings of Fact, Conclusions of Law and Order of the District Court Denying a Preliminary Injunction.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 72-1925.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104
ON BEHALF OF HIMSELF, AND
ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS

THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS
ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION
AND
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

OCTOBER 25, 1972.

Cletus P. Lyman, Philadelphia, Pa., for plaintiff.
Edwin P. Rome, Philadelphia, Pa., for defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

TROUTMAN, *District Judge.*

The Court, having considered the verified complaint, the answer and a stipulation ot facts entered into by respective counsel and having heard oral argument, now makes the following findings of fact and conclusions of law pursuant to F. R. Civ. P. 52(a).

FINDINGS OF FACT.

1. Plaintiff resides in Philadelphia, Pennsylvania, is a United States citizen, and is registered and able to vote in the United States presidential election on November 7, 1972.

2. Plaintiff is and was at all times relevant hereto the owner of fifty shares of common stock of Bethlehem Steel Corporation.

3. Bethlehem Steel Corporation (Bethlehem) is a Delaware corporation engaged primarily in the business of steel production, with a principal office in Bethlehem, Pennsylvania.

4. Bethlehem is the second largest producer of steel in the United States, and in 1971 it had net sales of approximately $2,963,602,000 and net income of approximately $139,239,000.

5. Bethlehem had on September 30, 1972 about 202,670 stockholders who owned about 44,469,541 shares of common stock, which were outstanding on that date. The market value of each share of common stock during 1972 has ranged from a high of $34⅝ to a low of $25⅞, and the closing value of a share of common stock on October 16, 1972 was $25⅞. Plaintiff, who owns fifty shares of such common stock, has owned said stock for more than one year.

6. In connection with the September 11, 1972, mailing of a quarterly dividend to its stockholders, Bethlehem included in the mailing envelope sent to each stockholder a reprint of an advertisement (the "Advertisement") entitled, "I say, let's keep the campaign honest. Mobilize 'truth squads' . . . .". (Exhibit A)

7. The advertisement appeared from on or about August 22, 1972 until September 7, 1972, in various media of national and local circulation, including "Newsweek", "Time", "U. S. News and World Report", "Business Week", "Saturday Review", "Editor and Publisher" and nineteen local newspapers in towns in which Bethlehem has plants.

8. Various magazines in which the advertisement appeared, including "Time", "Newsweek" and "U. S. News and World Report" are distributed nationally to subscribers and by sale at newsstands throughout the United States.

9. "Time", "Newsweek" and "U. S. News and World Report" are published weekly and have substantial circulation.

10. The Public Affairs Department of Bethlehem as indicated in the advertisement will send to each person on request a copy of Mr. Cort's speech entitled "Speak Out for Truth", and a copy of a folder entitled "How you can help to keep the campaign honest".

11. The placement and purchase of the advertisement and the printing and mailing of Mr. Cort's speech and the folder entitled "How you can help to keep the campaign honest" have been, and are being paid for out of the general corporate funds of Bethlehem.

12. Bethlehem may cause the advertisement to appear in the future in media of national and local circulation.

13. The mailing by Bethlehem of Mr. Cort's speech and the folder entitled "How you can help to keep the campaign honest" is continuing at present and may continue in the future. Approximately 5,500 copies of the speech and folder have been sent.

14. A Federal election is scheduled for November 7, 1972, at which voters will have an opportunity to vote for electors for the Presidency and Vice-Presidency of the United States, and for various other Federal offices, including members of Congress.

15. The advertisement, the speech and the folder do not mention by name any person currently a candidate for any local, state or Federal office, and they do not endorse or disparage the candidacy of any person currently seeking election to any local, state or Federal office.

16. The advertisement, the speech and the folder state a variety of viewpoints on issues which voters may face in

the upcoming elections, without identifying any particular candidate with any particular political view.

DISCUSSION.

Beginning on August 22, 1972, the "advertisement" about which plaintiff complains appeared in various news media and was distributed to shareholders of the defendant corporation, Bethlehem Steel Corporation, on September 11, 1972. On October 16, 1972, plaintiff formally filed a complaint seeking a preliminary injunction restraining such advertisement. On October 11, 1972, at about 5 P. M., plaintiff applied for a temporary restraining order. After notice, hearing was held on October 13, 1972, and said application was denied. Thereafter, the parties conferred and appeared before the Court on October 20, 1972, submitting a stipulation of facts in lieu of testimony, upon which we base the foregoing "findings of fact". Proposed amended findings and conclusions were submitted to the Court on October 24, 1972, and because of the coming Federal election on November 7, 1972, plaintiff seeks an immediate decision. Therefore, time does not permit the preparation and filing of an expanded and detailed discussion and opinion.

For the purpose of this application for a preliminary injunction, it is sufficient to say that a party seeking a preliminary injunction must establish by clear, positive proof the existence of four essential preconditions to the granting of injunctive relief: (1) irreparable harm to himself absent an injunction; (2) the absence of substantial harm to the defendants; (3) the absence of harm to the public interest; and (4) a likelihood that he will prevail on the merits. Winkleman v. N. Y. Stock Exchange, 445 F. 2d 786, 789 (3d Cir. 1971); Nelson v. Miller, 373 F. 2d 474, 477 (3d Cir. 1967). Failure to adequately establish at least a reasonable probability of success on the merits justifies denial of an

injunction on this ground alone. Industrial Electronics Corp. v. Cline, 330 F. 2d 480, 482 (3d Cir. 1964).

Title 18 U. S. C. § 591, as amended, defines, as follows, the term "expenditure" as otherwise used in the Act:

> "(f) 'expenditure' means—
>
> (1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), *made for the purpose of influencing the nomination for election, or election, of any person to Federal office,* for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;
>
> (2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and
>
> (3) a transfer of funds between political committees." (Emphasis supplied)

Thus, as defined, it contemplates a specific purpose; i.e., influencing the election of a person to Federal office. Title 18 U. S. C. § 610 then continues:

> "§ 610. *Contributions or expenditures by national banks, corporations, or labor organizations.*
>
> "As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect

> payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization; *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

It is a criminal statute imposing, for its violation, a fine and penalty.

Thus, at the very threshold, the plaintiff must establish an implied cause of action under said statute. Civil actions may be implied from criminal statutes designed to protect a specific class. Common Cause v. Democratic National Committee, 333 F. Supp. 803 (D. D. C. 1971). The purpose of

Section 610 is to assure a popularly elected government for all the people in the United States and its main concern is to "eliminate the effect of aggregated wealth on federal elections". Pipefitters Local No. 562 et al. v. United States, 407 U. S. 385, 92 S. Ct. 2247, 33 L. Ed. 2d 11 (1972). True, a secondary concern of Section 610 is to protect dissenting or minority shareholders, of which plaintiff is one. Thus, since the *primary* purpose of the Act was to protect the public, rather than dissenting shareholders, a substantial showing of congressional intent is required to provide an implied cause of action. Congress expressly vested in the Department of Justice the authority to enforce the Act. The sanctions imposed are purely penal in nature. On this record, we cannot hold, as plaintiff contends, that a private cause of action must be implied because the Department of Justice resources are inadequate to enforce the Act and thereby are inadequate to protect the public interest. Neither can we assume the partisan enforcement of the Act as plaintiff suggests. We, therefore, hold that the penal sanctions imposed are exclusive and that no private cause of action is implied. Chavez v. Freshpict Foods, Inc., 456 F. 2d 890 (10th Cir. 1972). For this reason alone an injunction must be denied.

The second issue arises, namely, whether the advertisement constitutes a violation of Section 610, which proscribes any expenditure or contribution to a candidate, campaign committee, political party or organization in connection with any Federal election. Section 591 defines expenditure as used in Section 610 as ". . . anything of value . . . for the purpose of influencing the nomination for election, or election, of any person to Federal office." Here, the ostensible purpose—apparent on the face of the advertisement—is to mobilize and seek honest campaigns. Only incidentally does it seek to refute the statement of an unnamed candidate for political office. There is nothing in the Act which suggests a corporation or a labor union must sit idly by as accusations are being made against it or the industry or segment of the business community of which it is a part. The advertisement or article is not directed to the election of a specific person or persons or, indeed, of any persons to Federal office, as contemplated by 18 U. S. C. § 591(f). Neither is it directed to a specific candidate, campaign committee, political party or organization, as contemplated by 18 U. S. C. § 610.

We conclude that the purpose of the advertisement was not to influence the election of a specific candidate, but rather to seek an honest campaign and election and, incidentally, to respond to an accusation leveled against the business community. Thus, the payment for the advertisement did not constitute an "expenditure" within the meaning of Section 591(f) and Section 610.

A third issue arises in that defendants challenge the constitutionality of the Act. We need not reach the constitutional issue. Under the facts and circumstances of this case, we have construed the term "expenditure" to exclude a situation where, as here, a corporation (or a labor union) expends its general funds to communicate to the public (a) its views as to honest campaigns and elections, an issue vital to its corporate interest and to the public; (b) its views as to a statement made by an unnamed candidate for election aimed at the community of which it is a part; and (c) without advocating the election of any particular person or party.

In thus construing the term "expenditure", we need not decide whether the statute is overbroad in that it unduly infringes upon the First Amendment rights of either corporations or labor unions.

Accordingly, on the basis of the record before us, we make and enter the following

CONCLUSIONS OF LAW.

1. The Court has subject-matter jurisdiction over Count I of the complaint, pursuant to 28 U. S. C. § 1331.

2. The Court has personal jurisdiction over defendant, Bethlehem Steel Corporation.

3. Plaintiff has failed to prove that there is a likelihood of success on the merits, in that:

(a) plaintiff has no private right of action under 18 U. S. C. § 610;

(b) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder are not "contributions or expenditures" within the meaning of 18 U. S. C. § 610;

(c) the expenditures made by Bethlehem Steel in connection with the advertisement, the speech and the folder are not "expenditures" made for the purpose of influencing the nomination for election, or the election of any person to Federal office" and, hence, are not "expenditures" within the meaning of 18 U. S. C. § 591(f)(1);

(d) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech, and the folder did not constitute "active electioneering directed at the general public on behalf of a candidate in a Federal election" as defined in the legislative history to the recent amendment of 18 U. S. C. § 610; Congressional Record, November 30, 1971, H 11477, 11478;

(e) to enjoin the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech, and the folder would prevent a corporation

from seeking an honest campaign and election and refuting a statement made by an unidentified candidate, which is adverse to its interest, thereby giving rise to grave First Amendment issues;

(f) under the facts and circumstances of this case, 18 U. S. C. § 610 must be narrowly construed to avoid an overbroad application infringing on a corporation's (and labor union's) First Amendment right to seek an honest campaign and to refute statements on issues of crucial concern to it and to the public, thus preventing a public debate on such issues.

4. Plaintiff has failed to prove that injunctive relief would not cause substantial harm to defendants.

5. Plaintiff has failed to prove that injunctive relief would not be harmful to the public interest.

6. In failing to prove a likelihood of success on the merits, plaintiff has failed to prove that irreparable harm would result if an injunction is not granted.

A preliminary injunction will be denied.

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation

BEST COPY AVAILABLE



"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

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As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business—you must pay your fair share."

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APPENDIX G.

18 U. S. C. § 610. Contributions or expenditures by national banks, corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which emloy-

ees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Federal Election Campaign Act of 1971, P. L. 92-225.

Title II, Section 205:

Section 610 of title 18, United States Code, relating to contributions or expenditures by national banks, corporations, or labor organizations, is amended by adding at the end thereof the following paragraph:

"As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of

value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

Federal Election Campaign Act of 1971, P. L. 92-225.

Title II, Section 201:

Section 591 of title 18, United States Code, is amended to read as follows:

§ 591. Definitions.

"When used in sections 597, 599, 602, 608, 610, and 611 of this title—

"(a) 'election' means (1) a general, special, primary, or run-off election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and (5) the election of delegates to a constitutional convention for proposing amnedments to the Constitution of the United States;

"(b) 'candidate' means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal office, if he has (1) taken the action necessary under the law of a State to qualify

himself for nomination for election, or election, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

"(c) 'Federal office' means the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

"(d) 'political committee' means any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

"(e) 'contribution' means—

"(1) a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;

"(3) a transfer of funds between political committees;

"(4) the payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; and

"(5) notwithstanding the foregoing meanings of 'contribution', the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee;

"(f) 'expenditure' means—

"(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating conven-

tion of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

"(3) a transfer of funds between political committees;

"(g) 'person' and 'whoever' mean an individual, partnership, committee, association, corporation, or any other organization or group of persons; and

"(h) 'State' means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.".

First Amendment to the Constitution of the United States.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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SPEAK OUT FOR TRUTH

by
STEWART S. CORT
Chairman
Bethlehem Steel Corporation

Rotary Club
Jacksonville, Florida
June 12, 1972



Stewart S. Cort

The title of my talk consists of four words of advice: "Speak Out For Truth."

Why do I see this need? Because we've recently lived through a number of political primary campaigns—in Florida and in my own state, Pennsylvania—and it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a long presidential campaign ahead, during which we can clearly see a lot more of the same.

I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community. I'll give you a few examples of what I have in mind:

In a recent speech in Pittsburgh, a prominent presidential candidate said this: "What you have in Washington today is government of the money, by the money, and for the money. We're going to drive the money-changers out of the temple."

At a conference in Washington last month a potential presidential candidate said this: "To me, the ITT case says it all. The doors of the White House are open wide to every chairman of the board, but they are closed tight to the American working man."

As for business taxation, one of the candidates said this: "The time has come for a tax system that says to big business—you must pay your fair share."

That's a reasonable demand, but it implies that we aren't already paying our "fair share." My own company has been tagged with that sort of accusa-

tion despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 *billion* for the 10 years from 1962 through 1971.

So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden.

But corporations aren't the only targets. One candidate talks about "$28 billion in tax loopholes for the rich and powerful" and he calls for tax reform and other economic policies that, in the words of Chet Huntley, are "far to the left of Norman Thomas."

Put it all together and you'll see, as many observers have already warned, that business enterprise is sure to be a major issue during the upcoming presidential campaign. It's bound to be; the temptation is irresistible, at least to anyone who puts political advantage above all else.

As is perfectly clear to you, I don't share the views of those extreme critics of our society. But I certainly do admit that severe criticism is very much in fashion. It has all the earmarks of a vote getter. It'll get votes from the ideological extremes, from both extremes. It'll get votes from those who are terribly disillusioned, frustrated, and fearful. And it'll get votes from people who don't have that one commodity that has always sustained the American people, no matter how unhappy their circumstances —I refer to hope.

A campaign based on cynicism and mistrust will surely meet some measure of success because the way has been cleared by an army of malcontents. They've filled the bookshelves with volumes calling our society *The Sick Society*; branding the nation as *America, Incorporated*; saying we victimize the public *In The Name of Profit* and

deploring what has been called "Consciousness I and II." The illness and the cure are documented in what has been titled *A Populist Manifesto.*

And, when the Committee for Economic Development issued a booklet urging all business firms to accept a high degree of social responsibility, it was greeted with these words, written by one of the most prominent columnists for one of the country's most prominent newspapers:

> "The mania of maximization of profit seems to turn businessmen into economic Richard Specks, people so demented that they will have that last dollar although, if they were sane, they'd know that to make it they must sacrifice their own physical health and well-being."

With that sort of propaganda flooding us, no wonder a recent survey found that 46 percent of all Americans think big business is "dangerous to our way of life." This is plain nonsense. Would nearly every American family have a car if it weren't for so-called "big business"? Would we have telephones and television and indoor plumbing in most homes? Would we have the levels of education and nutrition and health care that, however imperfect, are the envy of most human beings elsewhere on this planet?

Well, I won't take your time defending "big business." Even when the critics aim their blasts at "big business," the fallout injures all businesses, big and small, and a lot of citizens who aren't even "businessmen."

Is this of any concern to you? You bet it is! Consider, for a moment, the current epidemics of shoplifting and vandalism. Sure, we've always had to contend with larceny and destructive individuals, but has this kind of conduct ever before been condoned by whole groups in our society? Today the so-called "rip-off" has become a sort of art form and

a folk religion.

Are businessmen the only ones who suffer because of shoplifting? You know the answer. We all suffer because of the resulting higher prices. We all pay the high costs of preventing vandalism and repairing its damages.

And let me read you a sad little item that appeared in one of our local newspapers on May 13th:

> "The owners of a shop in Allentown wanted to run a store which sold things to kids at reasonable prices, that didn't 'rip-off' the customers. In appreciation, the shoplifters went to work on them. 'The kids steal anything they can get their hands on and put in their pockets,' said one proprietor. 'We try to sell things at a low price, but it seems some people just have to steal'."

I don't think I have to add anything to that newspaper story. It speaks for itself. Ask yourself whether the situation will improve, or get worse, if the upcoming political campaign features the nation's leading politicians preaching that business is evil, that it makes excessive profits by gouging and cheating and deceiving the American public. It's something to think about.

Now let's take a look at another specific issue that ought to concern you and me. Everybody's talking about tax reform, but watch out for rhetoric about "closing the loopholes" that only benefit "the rich and powerful." As *The Wall Street Journal* commented the other day, one of the biggest so-called "loopholes" is the provision enabling homeowners to deduct mortgage interest and property taxes from Federal taxable income.

Well, there are many millions of homeowners in this country and they aren't all "rich and powerful." Most of them are just ordinary citizens. And, as a matter of fact, I always thought there was a

sound public policy behind those deductions—to encourage people to own their own homes. Take the deductions away and I doubt you'd prevent wealthy people from owning homes, but you'd surely make it tough on everybody else.

And, talking about personal income taxes, is there a single person here who thinks his taxes are too low? Well, there are candidates who think they're *way* too low.

And that's only the beginning. There are proposals to virtually confiscate inheritances over a certain amount; to end the tax exemption for state and municipal bonds; to reduce depletion and depreciation allowances; to outlaw the tax limitations on capital gains—you name it, somebody's talking about it.

But there's no need for me to go on and on. You've heard all those proposals, and I hope you see them as I do—not so much as threats to people who are wealthy, but threats to everyone who asks nothing more than the same opportunities that Americans have always had.

In fact, the avowed purpose of all those proposals is to give the government even greater power to redistribute income.

Now, don't get me wrong. The stated objectives are very worthy—to use that power to stamp out poverty; to improve health care; to provide jobs for every American; to eliminate the inequities in our society.

All those aims are wholly admirable and we should strive to achieve them. But is this the way to do it? I can't imagine how destroying individual incentive and confiscating savings can possibly provide more employment. It would, in fact, have the opposite effect.

But I won't quibble over specific points. Let me focus on the broadest aspect of this thing, and

that's the really important issue. What I have in mind is nothing less than individual freedom. The kind of collectivized society those people are talking about is the greatest threat on earth to our freedom.

In mid-May William F. Buckley gave a talk in my community. I wasn't able to attend, but the next morning's paper reported this:

> "Mr. Buckley said there is an increasing tendency of Americans to trade in their many freedoms for bits of economic and social security."

How right he is! Now, just by coincidence, another article appeared in the very same edition of the paper. It was a dispatch from the *Times* of London; maybe it appeared in your local papers.

It summarized a report from Sweden, and Sweden, as you probably know, is the most highly socialized country in the western world. The headline of this article was: "Sweden has harsh, ruthless society, report confirms."

The Swedes have free health care and cradle-to-grave security. But what does it cost them?

They have just about the highest prices in the world; they consume more alcohol per capita than any other people in the world; and they are suffering what amounts to an epidemic of mental breakdowns.

In the interests of equality, most things in Sweden are standardized. In the words of the report: "It is true that if you have seen one Swedish town, you've seen them all .... Swedish flats and houses are so much alike that you can enter any kitchen in the country and usually know where the rubbish bin is located." How'd you like living under those conditions?

But here's the worst part of it. Listen to this: "Many observers believe that some chilling aspects of the '1984' society appeared in Sweden several years ago." This type of society, writes the Swed-

ish psychiatrist who prepared the report, "leads to a prodigious, human-crushing process."

Is that what the so-called "populist" movement in America really wants—to crush the human spirit? One of the great ironies of it all is that the populist movement is seen as a rebirth of Jeffersonian philosophy. Now, that's a strange thing, because I've checked into what Thomas Jefferson thought this country is all about, and his ideas are remarkably fitting today.

Listen to these words on taxation and government spending, written in 1816:

> "... private fortunes are destroyed by public as well as by private extravagance. And this is the tendency of all human governments.... till the bulk of society is reduced to mere automatons of misery, to have no sensibilities left but for sinning and suffering.... And the fore horse of this frightful team is public debt. Taxation follows that, and in its train wretchedness and oppression."

As sure as I'm standing here, the economic programs now being preached by some political candidates would, if implemented, bring an end to democracy and freedom as we know it in this land, not overnight, but in the foreseeable future.

This is not to say that continual and gradual changes in our society aren't needed, and needed badly. There's still a lot of inequity in our land; there's a lot of poverty; there's a lot of suffering that must be remedied. But we must find a way to do it that doesn't stop our economy in its tracks—a way that doesn't wipe out the individual liberties that have made us a proud country, with every right to be proud.

That's more than enough moralizing. I'm not a philosopher; I'm a practical man. And that's why

I'd like to give a few practical suggestions. The political campaigns are coming. And, as I've pointed out, we know what a lot of the candidates are going to be saying. I say, let's keep them honest.

Right now, look at their declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups like this one, groups with a deep interest in good government, organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

One thing you can do is talk in advance with the communications media in this area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action.

I've quoted Thomas Jefferson before and I'll quote him just one more time. It seems that Jefferson didn't like long-winded speeches. In 1824, in a letter to the president of a debating society, he said this: "Amplification is the vice of modern oratory. It is an insult to an assembly of reasonable men, disgusting and revolting instead of persuading. Speeches measured by the hour, die with the hour." That's good advice, and I'll follow it. Thank you!

Public Affairs Department
Bethlehem Steel Corporation
Bethlehem, PA 18016

Booklet 2901 7'28, Printed in U.S.A.

How you can help to keep the campaign honest

There are many things you can do—either as an individual, or as a member of an organization—to help promote responsible, truthful campaigning by political candidates. We urge your full participation.

Become informed. Determine what the major issues are in this year's elections—such as Vietnam, inflation, taxes, unemployment, environment, foreign affairs, busing, and law and order. Read books, magazines, periodicals, and reports to gain background; read newspapers to follow current trends. Make a habit of watching televised news programs, and listening to radio reports. Discuss the issues with your friends, neighbors, and business associates.

In addition, find out what the candidates stand for. What are their proposals and political philosophy? What have their records been on major issues? What are their qualifications for office?

Prepare. Forewarn the communications media about possible false statements that could be made by political candidates. Also, advise newspaper publishers, editors, reporters, radio and television people, and magazine publishers of any fallacies in the political programs of candidates. Use

facts and illustrations, and give them the sources of your material.

If you work for a fairly large business organization, see to it that your sales people and legislative representatives are advised to report any false or misleading statements that come to their attention, so that appropriate rebuttal can be made. Encourage your executives to accept speaking engagements and to urge their audiences to keep candidates honest.

Be inquisitive. Scrutinize articles and speeches by candidates. When you encounter a statement that seems unlikely, or is inconsistent with your own knowledge, check on it. Your sources, of course, will vary with the subject you are researching, but the following may be useful to you: The Readers Guide to Periodical Literature, and the Public Affairs Information Service at your local library include a listing of current books, magazine and periodical articles, and government documents. Also, use encyclopedias and almanacs; informational services of chambers of commerce, and other local business associations. Keep in touch with the public affairs or public relations offices of major corporations or of national organizations such as the National Association of Manufacturers, the Chamber of Commerce of the United States, and various trade associations or technical societies. Or ask the candidate himself to provide the source of his information. If the facts contradict the statement you are researching, document your sources.

Correct the record. If you are attending an open meeting at which a political candidate—or anyone else—makes a statement you know to be wrong, stand up and question him, perhaps during the question and answer session. If that is not possible, or if you hear or read such a statement in the news media, write to the candidate, the radio and television stations or newspapers which publicized the incorrect information, and perhaps to local newspapers in areas where the statement was heard

or read. Make your communications positive in tone; cite relevant facts and figures to prove your point.

Follow up. To the extent possible, check future statements of the candidate to be sure he has corrected the wrong information he has been using. If he has, write and thank him. If not, some of the following steps might be indicated: write or wire the local, state, or national leader of the candidate's political party, asking that he or she intervene; write or telephone officials of your local news media, suggesting that they prepare an editorial on the situation and that they discuss the issue in their news articles or programs. Communicate again with the candidate, telling him of the steps you have taken and strongly urging him to correct the wrong information he is using.

Talk with people. Talk with everyone with whom you come in contact about your efforts to promote responsible campaigning. Discuss the incorrect statements that have been made, and tell your listeners who made them. Encourage them to become active in their own localities.

Finally, form "Truth Squads." Involve your friends, neighbors, church groups, business organizations, civic clubs and schools in the effort to promote truthful, honest political campaigning. Divide the research and communication work among members of the Squad and meet periodically to discuss issues and projects, and to share information. Have each participant communicate with the officials suggested above in every instance where an irresponsible or incorrect statement is identified.

Public Affairs Department
Bethlehem Steel Corporation
Bethlehem, PA 18016

Folder 2902 728, Printed in U.S.A.

Supreme Court, U. S.
FILED
DEC 23 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

No. 73-1908.

STEWART S. CORT, ET AL.,

Petitioners,

v.

RICHARD A. ASH.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR CERTIORARI FILED JUNE 20, 1974.

CERTIORARI GRANTED NOVEMBER 11, 1974.

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DOCKET ENTRIES.

1 Sept. 28, 1972. Complaint filed.

Sept. 28, 1972. Summons Exit.

Sept. 28, 1972. JURY TRIAL DEMANDED.

2 Sept. 28, 1972. Order appointing Jeffrey A. Cokin to make service upon the defts' in this action, filed. 9/29/72 entered and copies mailed.

3 Sept. 29, 1972. Service accepted by G. L. Frankenfield on behalf of Bethlehem Steel Corp., filed.

4 Oct. 5, 1972. Notice of deft Bethlehem Steel Corp. of taking deposition of Plff Richard Ash, filed.

5 Oct. 6, 1972. Appearance of Blank, Rome, Klaus & Comisky, Esqs. for defts' Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, C. Thompson Stott, and Ivor D. Sims, filed.

6 Oct. 6, 1972. Appearance of Blank, Rome, Klaus & Comisky, Esqs. For Bethlehem Steel Corp., filed.

7 Oct. 11, 1972. Summons returned with affidavit of Jeffrey Cokin thereof, filed.

8 Oct. 13, 1972. Plff's Motion for Temporary Restraining Order, Memorandum in Support and Order that Motion is DENIED, filed. 10/16/72 entered and copies mailed.

9 Oct. 18, 1972. Appearance of Blank, Rome, Klaus & Comisky, Esqs. for defts' Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs and George P. Jenkins, filed.

10 Oct. 18, 1972. ANSWER, of all defts, filed.
CASE LISTED FOR TRIAL.

11 Oct. 24, 1972. Defts' Proposed Findings of Fact and Conclusions of Law, filed.

12 Oct. 26, 1972. Letter dated 10/16/72 to Judge Troutman from Cletus Lyman, Esq. Re: Counsel to prepare Amended Motion and Order as well as a supplemental breif, filed (As of 10/20/72).

13 Oct. 26, 1972. Plff's Motion for Preliminary Injunction, Memorandum of Law in Support and Notice thereof filed as of 10/20/72, filed.

14 Oct. 26, 1972. Plff's Amended Motion for Preliminary Injunction and Memorandum in Support thereof filed as of 10/20/72, filed.

15 Oct. 26, 1972. Defts' Memorandum in Opposition to Plff's Motion for Preliminary Injunction, filed.

16 Oct. 26, 1972. Stipulation of Agreed Upon Facts of Plff and defts', filed as of 10/20/72, filed.

17 Oct. 26, 1972. Letter dated 10/23/72 to Judge Troutman from Cletus Lyman, Esq. Re: Change of phrases in proposed draft of preliminary injunction, filed.

18 Oct. 27, 1972. Findings of Fact, Conclusions of Law Troutman, J. and Order that plff's motion for Preliminary Injunction is DENIED, filed. 10/30/72 entered and Notices mailed.

19 Nov. 1, 1972. Plff's Notice of Appeal, filed.

20 Nov. 1, 1972. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

Nov. 2, 1972. Record Transmitted to U. S. Court of Appeals (U. S. C. A. #72-1984).

21 Jan. 3, 1973. Transcript of 10/20/72, filed.

22 Jan. 15, 1973. Defts' Motion for Security for Expenses and Notice thereof, filed.

23 Jan. 15, 1973. Defts' Memorandum in support of Motion for Security for Expenses, filed.

24 Feb. 7, 1973. Plff's interrogatories to Nominal deft, Bethlehem Steel Corp., filed.

25 Feb. 7, 1973. Plff's Request to Nominal Deft, Bethlehem Steel Corp. for Production of Documents, No. 1, filed.

26 Feb. 9, 1973. Plff's Preliminary Memorandum in Opposition to defts' Motion for Expenses, filed.

27 Feb. 9, 1973. Certified copy of Judgment in lieu of formal mandate received from U. S. C. A. that the judgment of the District Court entered 10/27/72 is Affirmed, filed. 2/9/73 entered and copy to J. Troutman.

Feb. 9, 1973. Record on Appeal Returned.

28 Feb. 9, 1973. Withdrawal of Affidavit of Cletus P. Lyman and Submission of Affidavit of Richard A. Ash, filed.

29 Feb. 13, 1973. Defts' Objections to Plff's interrogatories, filed.

30 Feb. 13, 1973. Defts' Objections to Plff's Request for Production of Documents, No. 1, filed.

31 Mar. 7, 1973. Order that defts' motion for security for expenses as it relates to Count 1 of plff's complaint is Denied; that plff post a Bond in the Amount of $35,000 as security for expenses and such bond to be posted within (10) days of the date of this Order; plff's preliminary memorandum as a Motion for leave to Amend the complaint is GRANTED and that defts' objections to plff's interrogatories and request for documents as they relate to this Motion are sustained, filed. 3/7/73 entered and copies mailed.

32 Mar. 13, 1973. Plff's Motion to Compel Answers to Interrogatories, Memorandum in Support and Notice thereof, filed.

33 Mar. 19, 1973. Plff's notice of taking deposition of deft, Stewart S. Cort, filed.

34 Mar. 19, 1973. First Amended Complaint, filed.

35 Mar. 29, 1973. Defts' Motion for Summary Judgment, Certificate of Service and Notice thereof, filed.

36 Mar. 29, 1973. Memorandum of Law in Support of defts' Motion for Summary Judgment, filed.

37 Mar. 30, 1973. Defts' Motion for a Protective Order, Certificate of Service and Notice thereof, filed.

38 Mar. 30, 1973. Defts' Memorandum of Law in support of Motion for Protective Order, filed.

39 Apr. 10, 1973. Plff's praecipe for entry of default on first amended complaint and affidavit in support thereof, filed.

Apr. 10, 1973. Defts' defaulted for failure to plea, filed.

40 May 4, 1973. Defts' Motion to set aside Entry of Default and for Sanctions and Notice thereof, filed. (ANSWER TO AMENDED COMPLAINT ATTACHED).

41 May 4, 1973. Defts' Memorandum in support of Motion to set aside Entry of Default and for Sanctions, filed.

Jun. 4, 1973. ARGUED SUR: Deft's Motion to set aside default.

42 Jun. 5, 1973. Order that defts' motion to set aside entry of default is GRANTED, defts' motion for sanctions is DENIED and that Plff respond to defts' motion for summary Judgment within (10) days from the date of this Order, filed. 6/6/73 entered and copies mailed.

43 Jun. 15, 1973. Plff's Memorandum in opposition to defts' Motion for summary judgment and Exhibits in support thereof, filed.

44 Jun. 21, 1973. Defts' Reply Memorandum in support of Motion for Summary Judgment, filed.

45 Jun. 22, 1973. Transcript of 6/4/73, filed.

46 July 3, 1973. Defts' Memorandum of Law in opposition to plff's Motion for an Evidentiary Hearing and for continuation of defts' Motion for Summary Judgment, filed.

47 July 9, 1973. Plff's Motion for an Evidentiary Hearing on the Question of Plff's standing and for Continuation of defts' Motion for Summary Judgment, Memorandum of Law in Support and Notice thereof, filed.

48 July 9, 1973. Affidavit of Richard A. Ash, Esq. in Support of Motion for an evidentiary hearing etc., filed.

49 July 11, 1973. Order that Plff's motion for an evidentiary hearing and for continuation of defts' motion for summary judgment is DENIED and that defts' motion for summary judgment is GRANTED, filed. 7/12/73 entered and copies mailed.

50 July 18, 1973. Plff's Notice of Appeal, filed.

51 July 18, 1973. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

Aug. 7, 1973. RECORD TRANSMITTED TO U. S. C. A. (U. S. C. A. #73-1739).

Oct. 4, 1973. Bond for Costs on Appeal in the sum of $250.00 with Fidelity and Deposit Co. of Maryland, filed.

52 Oct. 31, 1973. Certified copy of Order received from U. S. C. A. DENYING Appellees' motion to Dismiss appeal on the ground that Appellant has failed to file a bond for costs on appeal, filed. 11/1/73 entered and copy mailed to Judge Troutman.

53 Jun. 13, 1974. Defts' Memorandum of Law in Opposition to Plff's Motion for leave to take depositions and to Request Production of Documents, filed.

54 Jun. 14, 1974. Plff's Motion for leave to take depositions and to request production of Documents, Memorandum in Support and Notice thereof, filed.

55 Jun. 27, 1974. Order that plff's motion for leave to take depositions and to request production of documents pending appeal is DENIED, filed. 6/28/74 entered and copies mailed.

56 July 11, 1974. NOTICE OF APPEAL OF PLFF, FILED.

57 July 11, 1974. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

July 16, 1974. FIRST SUPPLEMENTAL RECORD TRANSMITTED TO U. S. COURT OF APPEALS.

Sep. 6, 1974. plff's. bond for costs on appeal, in the amount of $250.00, and with Fidelity and Deposit Co. of Maryland as surety, filed.

58 Nov. 14, 1974. Certified copy of ORDER, from the U. S. C. A., that def.-appellee's motion to dismiss the appeal for lack of jurisdiction is referred to the panel before which this appeal is listed for disposition; Appellee is granted 10 days within which to file its answering brief, filed.

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104
ON BEHALF OF HIMSELF,
AND ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

Plaintiff,

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS

THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS,

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION

Defendants

AND

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,

Nominal Defendant.

COMPLAINT.

1. Plaintiff Richard Ash is an individual residing at the Plaza Apartment, 18th & Benjamin Franklin Parkway, Philadelphia, Pennsylvania.

2. Nominal defendant, Bethlehem Steel Corporation (Bethlehem Steel) is a Delaware Corporation with principal office located at 701 East Third Street, Bethlehem, Pennsylvania, engaged, *inter alia,* in the business of steel production, distribution and sale.

3. Bethlehem Steel is the second largest United States steel producer with annual gross sales in excess of $3.5 billion annually. It maintains plants and offices for the carrying out of its business throughout the United States, including the Eastern District of Pennsylvania.

4. Defendants Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, Ivor D. Sims, C. Thompson Stott, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs and George P. Jenkins, are individuals residing within the United States, who com-

prise the Board of Directors of Bethlehem Steel, Cort being the Chairman of said Board. Foy, Bickford, Broeker, Reed, Sims and Stott serve additionally as top echelon executives of said company; Foy as its President; and the others as Executive Vice Presidents.

5. By virtue of their said positions with Bethlehem Steel, defendants control the policy making of the corporation, its implementation of such policies, and the disbursement of corporate funds pursuant to and in furtherance of such policies.

6. Bethlehem Steel is a publicly held corporation whose stock is traded and listed on the New York Stock Exchange. Its stock is widely distributed to in excess of 200,000 holders, a substantial number of whom live within the United States and within the Eastern District of Pennsylvania.

7. Plaintiff is, and was at all times herein material, the owner of 50 shares of Bethlehem Steel stock. He is, in addition, a citizen of the United States, registered and qualified to vote in the 1972 United States presidential election.

8. Plaintiff brings this action in an individual capacity as a shareholder, a United States citizen and a qualified voter in the said presidential election, and derivatively on behalf of Bethlehem Steel Corporation, and alleges that he is well able to fairly, ably and effectively represent the rights and interests of said corporation.

9. No demand has been made upon the Directors of Bethlehem Steel to seek similar redress directly, because said Directors are involved in and responsible for the wrongdoing out of which plaintiff's suit arises.

10. No request for concerted action has been made to plaintiff's fellow shareholders in Bethlehem Steel, because

they are too numerous and too widely scattered to make such request practicable.

11. This action is not a collusive one to confer jurisdiction upon a court of the United States which it would not otherwise have.

COUNT I.

12. This count arises out of alleged violation by defendants of the criminal statutes of the United States governing elections and political activities, commonly known as the Federal Corrupt Practices Act, specifically Title 18, Section 610, U. S. C. A. of said Act, and the private remedy for redress of grievances implied under said Act. Jurisdiction is invoked under Title 28, Section 1331, U. S. C. A., the amount in controversy exceeding the sum of $10,000, exclusive of interest and costs.

13. At some time in 1971 or 1972, defendants entered into a plan involving the utilization of Bethlehem Steel's resources, including the expenditure of its funds, in connection with the 1972 United States presidential election.

14. The ultimate purpose of said plan was to influence the United States electorate to help bring about a Republican Party victory in said election. This purpose was solely in furtherance of the individual interests and beliefs of defendants and was in violation of state and federal law, and in derogation of the rights of the United States public, and of the approximate one half of the shareholders of Bethlehem Steel that are registered members of the Democratic political party.

15. Thereafter, in furtherance of said plan and purpose, defendants caused, and continue to cause, corporate resources to be utilized, including the expenditure of substantial funds in connection with said political campaign,

including, *inter alia,* their causing to be prepared and disseminated at corporate expense, an advertisement entitled "I SAY LET'S KEEP THE CAMPAIGN HONEST. MOBILIZE 'TRUTH SQUADS' . . .", attributed to defendant Cort. (A copy of said advertisement is attached hereto and made part hereof as Exhibit "A".)

16. Said advertisement has been and is being communicated to the United States' electorate as aforesaid, *inter alia,* by insertion in various magazines of national circulation, including NEWSWEEK, TIME, U. S. NEWS & WORLD REPORT, BUSINESS WEEK, SATURDAY REVIEW, INDUSTRY WEEK, FORBES, HARVARD BUSINESS REVIEW, EDITOR & PUBLISHER, and in various local newspapers, and by a direct mailing, to Bethlehem Steel shareholders.

17. The aforesaid actions by defendants have been and are in violation of said Federal Election law, which states in its here material part that:

> "It is unlawful for . . . any corporation whatever . . . to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for. . . ." Title 18, Sec. 610, U. S. C. A.

18. The said actions by defendants are, *a fortiori,* unlawful in that they involve the utilization of corporate resources for partisan political purposes in connection with said presidential election, pursuant to defendants' plan and purposes.

19. The said advertisement is blatantly partisan on its face, in that it in essence calls for the mobilization of "truth squads" to keep the campaign honest, on the basis of the following factors extracted therefrom:

"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

* * *

"As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: 'The time has come for a tax system that says to big business—you must pay your fair share.'" (Exhibit "A")

All of which factors can only reasonably be imputed to activities of Democratic candidates and programs and policies that are identified by the public with the Democratic party and its current candidate for the presidency.

20. Defendants have thus far caused an unlawful expenditure by Bethlehem Steel in connection with the 1972 Presidential Election Campaign, as aforesaid, of corporate funds and other resources with a total value in excess of $500,000, which wrongful expenditure continues.

COUNT II.

21. This count arises under the common law and the laws of the State of Delaware. Jurisdiction of this court is invoked under the pendent jurisdiction of the federal courts.

22. Plaintiff incorporates herein by reference his averments in Paragraphs 1 through 20 inclusive.

23. Defendants' said acts and expenditures of corporate resources in connection with the election campaign are *ultra vires,* unlawful and constitute willful, wanton and gross breach of their duty owed to said corporation.

WHEREFORE, plaintiff respectfully requests that this Honorable Court enter:

(A) An Order temporarily and permanently restraining and enjoining defendants from any further expenditures of corporate resources, directly or indirectly, in connection with the 1972 Presidential Election Campaign, or any future political campaign.

(B) An Order that defendants immediately place corrective advertising at their own expense in national media under the direction, and subject to the approval of, the Court.

(C) Judgment against defendants jointly and severally and in favor of plaintiff corporation in an amount in excess of $500,000 compensatory damages.

(D) Judgment against defendants jointly and severally and in favor of plaintiff corporation for punitive damages commensurate with their wrongdoing.

(E) Judgment against defendants jointly and severally and in favor of plaintiff for costs of suit, including reasonable attorneys' fees.

(F) Such other further and different relief as appears proper under the circumstances.

CLETUS P. LYMAN, ESQ.,
1612 Latimer Street,
Philadelphia, Pa. 19103

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

RICHARD A. ASH, being duly sworn according to law, deposes and says that he is the plaintiff in the within complaint and is familiar with the facts set forth therein which are true and correct to the best of his knowledge, information and belief.

/s/ RICHARD A. ASH.
Richard A. Ash.

Sworn to and subscribed to before me this 28 day of Sept., 1972.

/s/ NANCY H. BERGMAN.

NANCY H. BERGMAN, *Notary Public,*
PHILADELPHIA, PHILADELPHIA COUNTY,
MY COMMISSION EXPIRES MAY 6, 1976,
Member, Pennsylvania Association of Notaries.

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation



"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business—you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we aren't already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write: Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016.

This Advertisement is scheduled to appear in: Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and 19 Plant Town Newspapers, the Washington Post, and the Wall Street Journal.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

MOTION FOR TEMPORARY RESTRAINING ORDER.

Plaintiff hereby moves the Court for a Temporary Restraining Order against nominal defendant Bethlehem Steel Corporation to issue immediately and to be in force and effect until such time as the Court is able to adjudicate Plaintiff's Motion for Preliminary Injunction served upon counsel of defendants October 6, 1972 and to be formally filed with the Court October 16, 1972 pursuant to Rule 36 of the Local Rules of Civil Procedure. Plaintiff hereby asks the Court for an Order:

Prohibiting Bethlehem Steel Corporation from purchasing or paying for advertising identical to or substantially similar to Exhibit "A" hereof.

In support of this Motion plaintiff incorporates herein by reference the allegations of his verified complaint. Plaintiff further alleges as follows:

(1) that a United States federal election is scheduled for November 7, 1972, approximately 3 weeks from the date hereof;

(2) that Exhibit "A" hereof is primarily directed at influencing the outcome of said election;

(3) that injury to plaintiff caused by the continued placement of advertisements similar to Exhibit "A" prior to said election is irreparable in nature in that said election will result in a final and irreversible selection of office-holders of the United States including the President of the United States.

(4) by virtue of the short period of time remaining prior to the election each day of delay in obtaining relief changes the position of plaintiff to his detriment, and the time required for a hearing on Plaintiff's Motion for Preliminary Injunction will cause a substantial impairment of the relief obtainable by plaintiff; and

(5) no injury will be caused to nominal defendant Bethlehem Steel Corporation by reason of the issuance of the Order here requested.

WHEREFORE plaintiff respectfully requests that said Motion be granted by the Court.

CLETUS P. LYMAN, ESQ.,
1612 Latimer Street,
Philadelphia, Pa. 19103
Attorney for the Plaintiff.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH

v.

STEWART S. CORT, ET AL.

ORDER.

AND Now, this 13th day of October, 1972, it is hereby ADJUDGED, ORDERED and DECREED as follows: That plaintiff's Motion for a temporary restraining Order is DENIED.

By THE COURT:

/s/ E. MAC TROUTMAN,
E. Mac Troutman, U. S. D. J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT, ET AL.

ANSWER OF DEFENDANTS.

1. Admitted.

2. Admitted.

3. It is admitted that Bethlehem Steel Corporation is the second largest United States steel producer. It is denied that annual gross sales exceed 3.5 billion annually. It is admitted that it maintains plants and offices for the carrying out of its business throughout the United States, including the Eastern District of Pennsylvania.

4. It is admitted that Defendants Cort, Foy, Bickford, Broeker, Reed, Sims, Stott, Baker, Gates, Hobbs, and Jenkins are individuals residing within the United States, who comprise the Board of Directors, Cort being the Chairman of said Board. It is denied that Jess H. Davis, who died prior to the institution of this action is a Director. It is admitted that Defendants Foy, Bickford, Broeker, Reed, Sims and Stott serve additionally as top echelon executives, Foy as its President. It is denied that defendants Bickford, Reed, and Stott are Executive Vice-Presidents.

5. It is admitted that the Directors of Bethlehem Steel Corporation perform the normal policy-making functions

of corporate directors, but it is denied that the Directors participate in each decision relating to the implementation of corporate policy.

6. Admitted.

7. It is admitted that plaintiff is and was at all times relevant hereto the owner of fifty shares of common stock of Bethlehem Steel Corporation. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments that plaintiff is a citizen of the United States, and that plaintiff is registered and qualified to vote in the 1972 United States presidential election.

8. Denied.

9. It is admitted that no demand has been made upon the Directors of Bethlehem Steel Corporation to seek redress directly in connection with plaintiff's allegations. It is denied that the Directors committed, authorized the commission of, or are in any way responsible for or involved in the commission of any illegal or wrongful acts. It is denied that there is any wrongdoing out of which the plaintiff's suit arises.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 10 of the Complaint.

11. Admitted.

COUNT I.

12. Denied.

13. Denied.

14. Each of the averments of paragraph 14 of the Complaint is denied with the exception of the averment that approximately one-half of the shareholders of Bethlehem Steel Corporation are "registered members of the Democratic political party". Defendants are without knowledge or in-

formation sufficient to form a belief as to the truth of the averment that one-half of the shareholders of Bethlehem Steel Corporation are "registered members of the Democratic political party".

15. Denied.

16. Denied as stated.

17. Denied.

18. Denied.

19. Denied. The advertisement referred to in paragraph 19 of the Complaint is not partisan and the expenditures made for publication of the advertisement were not made for the purpose of influencing the nomination for election, or election, of any person to Federal office. The advertisement neither endorses nor disparages the candidacy of any nominee for Federal office. The advertisement does not quote any candidate currently seeking election to Federal office, nor does it single out by name any candidate or political party. On the contrary, the advertisement on its face advocates a non-partisan, issue-oriented approach.

20. Denied.

First Defense.

The Complaint fails to state a claim upon which relief may be granted.

Second Defense.

Defendant Bethlehem Steel Corporation and Defendants Cort, Foy, Bickford, Broeker, Reed, Stott, Sims, Baker, Davis, Gates, Hobbs and Jenkins have not been properly served with process in this action.

Third Defense.

The Court lacks jurisdiction over the person of defendants Cort, Foy, Bickford, Broeker, Reed, Stott, Sims, Baker, Davis, Gates, Hobbs and Jenkins.

Fourth Defense.

The plaintiff lacks standing to sue.

Fifth Defense.

The expenditures referred to in the Complaint were not made for the purpose of influencing the nomination for election, or election, of any person to Federal office.

Sixth Defense.

No expenditures referred to in the Complaint were used for active electioneering.

Seventh Defense.

The Federal Corrupt Practices Act, 18 U. S. C. § 610, as amended by the Federal Election Campaign Act of 1971, is unconstitutional on its face and as applied to defendants herein because:

(1) The Act abridges the freedom of speech guaranteed by the First Amendment of the United States Constitution;

(2) The Act abridges the freedom of press guaranteed by the First Amendment of the United States Constitution;

(3) The Act abridges the freedom of association, the freedom of assembly and the right to petition the Government for a redress of grievances guaranteed by the First Amendment of the United States Constitution;

(4) The Act, in creating a classification of corporations and labor unions creates an arbitrary, unreasonable and invidious discrimination against defendants affecting their exercise of Constitutionally protected

rights, and denies their equal protection of the laws in violation of the Fifth Amendment of the United States Constitution;

(5) The Act arbitrarily and capriciously restricts the exercise of Constitutionally protected rights depriving defendants of due process of law in violation of the Fifth Amendment of the United States Constitution;

(6) In prohibiting "expenditures in connection with any" Presidential election, the Act on its face is unreasonably vague and indefinite in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

COUNT II.

21. Denied.

22. Defendants incorporate by reference the answers to paragraphs 1 through 20, to Count I.

23. Denied.

First Defense.

The Complaint fails to state a claim upon relief can be granted.

Second Defense.

Defendant Bethlehem Steel Corporation and Defendants Cort, Foy, Bickford, Broeker, Reed, Stott, Sims, Baker, Davis, Gates, Hobbs and Jenkins have not been properly served with process in this action.

Third Defense.

The Court lacks jurisdiction over the person of defendants Cort, Foy, Bickford, Broeker, Reed, Stott, Sims, Baker, Davis, Gates, Hobbs and Jenkins.

Fourth Defense.

The Court lacks jurisdiction over the subject matter of Count II.

WHEREFORE, defendants Bethlehem Steel Corporation, Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, C. Thompson Stott, Ivor D. Sims, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs and George P. Jenkins, respectfully request that the Complaint be dismissed and that plaintiff be directed to pay their reasonable expenses including attorneys' fees incurred by reason of this action.

/s/ EDWIN P. ROME,
Edwin P. Rome,
JEROME R. RICHTER,
Attorneys for Defendants,
Bethlehem Steel Corporation,
Stewart S. Cort, Lewis W. Foy,
Edward D. Bickford, Bernard
D. Broeker, Albert M. Reed,
C. Thompson Stott, Ivor D.
Sims, Crowdus Baker, Jess H.
Davis, Thomas S. Gates, Rob-
ert B. Hobbs and George P.
Jenkins.

Of Counsel:
BLANK, ROME, KLAUS & COMISKY,
Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103
215 LO 9-3700

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

MOTION FOR PRELIMINARY INJUNCTION.

Plaintiff hereby moves the Court for a preliminary injunction against nominal defendant Bethlehem Steel Corporation and against the twelve defendants herein, all of whom are directors of Bethlehem Steel Corporation. Plaintiff hereby asks the Court for an Order:

1. Prohibiting individual defendants from causing Bethlehem Steel Corporation to purchase or pay for any advertising in connection with any federal election, including but not limited to advertisements identical or substantially similar to Exhibit "A" hereof.

2. Prohibiting Bethlehem Steel Corporation from purchasing or paying for any advertising in connection with any federal election, including but not limited to advertisements identical to or substantially similar to Exhibit "A" hereof.

3. Directing Bethlehem Steel Corporation to cancel all advertising previously ordered in connection with any federal election, including but not limited to advertisements identical to or substantially similar to Exhibit "A" hereof.

4. Prohibiting Bethlehem Steel Corporation from using its personnel or property for the distribution of advertising materials, copies of speeches, or any other communications whatsoever in connection with any federal election, including but not limited to Exhibit "A" hereof.

5. Prohibiting Bethlehem Steel Corporation from making any expenditures whatsoever in connection with a federal election.

In support of the above requests, plaintiff incorporates herein by reference the allegations of his verified complaint.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman, Esq.,
1612 Latimer Street,
Philadelphia, Pa. 19103

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

STIPULATION OF AGREED UPON FACTS.

AND Now, this 20th day of October, 1972, the following facts are hereby stipulated and agreed to by and between plaintiff and defendants:

1. Bethlehem Steel Corporation (Bethlehem) is a Delaware corporation engaged primarily in the business of steel production, with a principal office in Bethlehem, Pennsylvania.

2. Bethlehem is the second largest producer of steel in the United States, and in 1971 it had net sales of approximately $2,963,602,000 and net income of approximately $139,239,000.

3. Bethlehem had on September 30, 1972 about 202,670 stockholders who owned about 44,469,541 shares of common stock, which were outstanding on that date. The market value of each share of common stock during 1972 has ranged from a high of $34⅝ to a low of $25⅞, and the closing value of a share of common stock on October 16, 1972 was $25⅞. Plaintiff, who owns fifty shares of such common stock, has owned said stock for more than one year.

4. Plaintiff resides in Philadelphia, Pennsylvania, is a United States citizen, and is registered and able to vote in the United States presidential election on November 7, 1972.

5. In connection with the September 11, 1972, mailing of a quarterly dividend to its stockholders, Bethlehem included in the mailing envelope sent to each stockholder a reprint of an advertisement (the "Advertisement") entitled, "I say, let's keep the campaign honest. Mobilize 'truth squads' . . .". A true and correct copy of the Advertisement is attached hereto as Exhibit "A".

6. The Advertisement appeared from on or about August 22, 1972 until September 7, 1972 in various media of national and local circulation, including "Newsweek", "Time", "U. S. News and World Report", "Business Week", "Saturday Review", "Editor and Publisher", and 19 local newspapers in towns in which Bethlehem has plants.

7. Exhibit "B" attached is a true and correct copy of the August 28, 1972, edition of "Time" magazine wherein the Advertisement appeared, facing page number 61.

8. Various magazines in which the Advertisement appeared, including "Time", "Newsweek" and "U. S. News and World Report", are distributed nationally to subscribers and by sale at newsstands throughout the United States.

9. "Time", "Newsweek" and "U. S. News and World Report" are published weekly and have substantial circulation.

10. The Public Affairs Department of Bethlehem as indicated in the Advertisement will send to each person on request a copy of Mr. Cort's speech entitled "Speak Out for Truth", a copy of which is attached hereto as Exhibit

"C", and a copy of a folder entitled "How you can help to keep the campaign honest", a copy of which is attached hereto as Exhibit "D".

11. The placement and purchase of the Advertisement and the printing and mailing of Exhibits "C" and "D" have been, and are being paid for out of the general corporate funds of Bethlehem.

12. Bethlehem may cause the Advertisement to appear in the future in media of national and local circulation.

13. The mailing by Bethlehem of Exhibits "C" and "D", as stated in paragraph 10 hereof, is continuing at present and may continue in the future. Approximately 5,500 copies of Exhibits "C" and "D" have been sent, as stated in paragraph 10 hereof.

14. A Federal election is scheduled for November 7, 1972, at which voters will have an opportunity to vote for electors for the Presidency and Vice-Presidency of the United States, and for various other Federal offices including members of Congress.

15. The Republican party nominee for the Presidency is Richard M. Nixon and the Democratic party nominee is George McGovern.

/s/

Cletus P. Lyman,
Counsel for Plaintiff.

/s/ Edwin P. Rome,
Edwin P. Rome,
Counsel for Defendants.

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation



"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business--you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we aren't already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016

This Advertisement is scheduled to appear in: Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and 19 Plant Town Newspapers, the Washington Post, and the Wall Street Journal.

SPEAK OUT FOR TRUTH

by

STEWART S. CORT
Chairman
Bethlehem Steel Corporation

Rotary Club
Jacksonville, Florida
June 12, 1972



Stewart S. Cort

The title of my talk consists of four words of advice: "Speak Out For Truth."

Why do I see this need? Because we've recently lived through a number of political primary campaigns—in Florida and in my own state, Pennsylvania—and it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a long presidential campaign ahead, during which we can clearly see a lot more of the same.

I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community. I'll give you a few examples of what I have in mind:

In a recent speech in Pittsburgh, a prominent presidential candidate said this: "What you have in Washington today is government of the money, by the money, and for the money. We're going to drive the money-changers out of the temple."

At a conference in Washington last month a potential presidential candidate said this: "To me, the ITT case says it all. The doors of the White House are open wide to every chairman of the board, but they are closed tight to the American working man."

As for business taxation, one of the candidates said this: "The time has come for a tax system that says to big business—you must pay your fair share."

That's a reasonable demand, but it implies that we aren't already paying our "fair share." My own company has been tagged with that sort of accusa-

tion despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 *billion* for the 10 years from 1962 through 1971.

So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden.

But corporations aren't the only targets. One candidate talks about "$28 billion in tax loopholes for the rich and powerful" and he calls for tax reform and other economic policies that, in the words of Chet Huntley, are "far to the left of Norman Thomas."

Put it all together and you'll see, as many observers have already warned, that business enterprise is sure to be a major issue during the upcoming presidential campaign. It's bound to be; the temptation is irresistible, at least to anyone who puts political advantage above all else.

As is perfectly clear to you, I don't share the views of those extreme critics of our society. But I certainly do admit that severe criticism is very much in fashion. It has all the earmarks of a vote getter. It'll get votes from the ideological extremes, from both extremes. It'll get votes from those who are terribly disillusioned, frustrated, and fearful. And it'll get votes from people who don't have that one commodity that has always sustained the American people, no matter how unhappy their circumstances --I refer to hope.

A campaign based on cynicism and mistrust will surely meet some measure of success because the way has been cleared by an army of malcontents. They've filled the bookshelves with volumes calling our society *The Sick Society*; branding the nation as *America, Incorporated*; saying we victimize the public *In The Name of Profit* and

deploring what has been called "Consciousness I and II." The illness and the cure are documented in what has been titled *A Populist Manifesto*.

And, when the Committee for Economic Development issued a booklet urging all business firms to accept a high degree of social responsibility, it was greeted with these words, written by one of the most prominent columnists for one of the country's most prominent newspapers:

> "The mania of maximization of profit seems to turn businessmen into economic Richard Specks, people so demented that they will have that last dollar although, if they were sane, they'd know that to make it they must sacrifice their own physical health and well-being."

With that sort of propaganda flooding us, no wonder a recent survey found that 46 percent of all Americans think big business is "dangerous to our way of life." This is plain nonsense. Would nearly every American family have a car if it weren't for so-called "big business"? Would we have telephones and television and indoor plumbing in most homes? Would we have the levels of education and nutrition and health care that, however imperfect, are the envy of most human beings elsewhere on this planet?

Well, I won't take your time defending "big business." Even when the critics aim their blasts at "big business," the fallout injures all businesses, big and small, and a lot of citizens who aren't even "businessmen."

Is this of any concern to you? You bet it is! Consider, for a moment, the current epidemics of shoplifting and vandalism. Sure, we've always had to contend with larceny and destructive individuals, but has this kind of conduct ever before been condoned by whole groups in our society? Today the so-called "rip-off" has become a sort of art form and

a folk religion.

Are businessmen the only ones who suffer because of shoplifting? You know the answer. We all suffer because of the resulting higher prices. We all pay the high costs of preventing vandalism and repairing its damages.

And let me read you a sad little item that appeared in one of our local newspapers on May 13th:

> "The owners of a shop in Allentown wanted to run a store which sold things to kids at reasonable prices, that didn't 'rip-off' the customers. In appreciation, the shoplifters went to work on them. 'The kids steal anything they can get their hands on and put in their pockets,' said one proprietor. 'We try to sell things at a low price, but it seems some people just have to steal'."

I don't think I have to add anything to that newspaper story. It speaks for itself. Ask yourself whether the situation will improve, or get worse, if the upcoming political campaign features the nation's leading politicians preaching that business is evil, that it makes excessive profits by gouging and cheating and deceiving the American public. It's something to think about.

Now let's take a look at another specific issue that ought to concern you and me. Everybody's talking about tax reform, but watch out for rhetoric about "closing the loopholes" that only benefit "the rich and powerful." As *The Wall Street Journal* commented the other day, one of the biggest so-called "loopholes" is the provision enabling homeowners to deduct mortgage interest and property taxes from Federal taxable income.

Well, there are many millions of homeowners in this country and they aren't all "rich and powerful." Most of them are just ordinary citizens. And, as a matter of fact, I always thought there was a

sound public policy behind those deductions—to encourage people to own their own homes. Take the deductions away and I doubt you'd prevent wealthy people from owning homes, but you'd surely make it tough on everybody else.

And, talking about personal income taxes, is there a single person here who thinks his taxes are too low? Well, there are candidates who think they're *way* too low.

And that's only the beginning. There are proposals to virtually confiscate inheritances over a certain amount; to end the tax exemption for state and municipal bonds; to reduce depletion and depreciation allowances; to outlaw the tax limitations on capital gains—you name it, somebody's talking about it.

But there's no need for me to go on and on. You've heard all those proposals, and I hope you see them as I do—not so much as threats to people who are wealthy, but threats to everyone who asks nothing more than the same opportunities that Americans have always had.

In fact, the avowed purpose of all those proposals is to give the government even greater power to redistribute income.

Now, don't get me wrong. The stated objectives are very worthy—to use that power to stamp out poverty; to improve health care; to provide jobs for every American; to eliminate the inequities in our society.

All those aims are wholly admirable and we should strive to achieve them. But is this the way to do it? I can't imagine how destroying individual incentive and confiscating savings can possibly provide more employment. It would, in fact, have the opposite effect.

But I won't quibble over specific points. Let me focus on the broadest aspect of this thing, and

that's the really important issue. What I have in mind is nothing less than individual freedom. The kind of collectivized society those people are talking about is the greatest threat on earth to our freedom.

In mid-May William F. Buckley gave a talk in my community. I wasn't able to attend, but the next morning's paper reported this:

> "Mr. Buckley said there is an increasing tendency of Americans to trade in their many freedoms for bits of economic and social security."

How right he is! Now, just by coincidence, another article appeared in the very same edition of the paper. It was a dispatch from the *Times* of London; maybe it appeared in your local papers.

It summarized a report from Sweden, and Sweden, as you probably know, is the most highly socialized country in the western world. The headline of this article was: "Sweden has harsh, ruthless society, report confirms."

The Swedes have free health care and cradle-to-grave security. But what does it cost them?

They have just about the highest prices in the world; they consume more alcohol per capita than any other people in the world; and they are suffering what amounts to an epidemic of mental breakdowns.

In the interests of equality, most things in Sweden are standardized. In the words of the report: "It is true that if you have seen one Swedish town, you've seen them all .... Swedish flats and houses are so much alike that you can enter any kitchen in the country and usually know where the rubbish bin is located." How'd you like living under those conditions?

But here's the worst part of it. Listen to this: "Many observers believe that some chilling aspects of the '1984' society appeared in Sweden several years ago." This type of society, writes the Swed-

ish psychiatrist who prepared the report, "leads to a prodigious, human-crushing process."

Is that what the so-called "populist" movement in America really wants—to crush the human spirit? One of the great ironies of it all is that the populist movement is seen as a rebirth of Jeffersonian philosophy. Now, that's a strange thing, because I've checked into what Thomas Jefferson thought this country is all about, and his ideas are remarkably fitting today.

Listen to these words on taxation and government spending, written in 1816:

> "... private fortunes are destroyed by public as well as by private extravagance. And this is the tendency of all human governments .... till the bulk of society is reduced to mere automatons of misery, to have no sensibilities left but for sinning and suffering .... And the fore horse of this frightful team is public debt. Taxation follows that, and in its train wretchedness and oppression."

As sure as I'm standing here, the economic programs now being preached by some political candidates would, if implemented, bring an end to democracy and freedom as we know it in this land, not overnight, but in the foreseeable future.

This is not to say that continual and gradual changes in our society aren't needed, and needed badly. There's still a lot of inequity in our land; there's a lot of poverty; there's a lot of suffering that must be remedied. But we must find a way to do it that doesn't stop our economy in its tracks—a way that doesn't wipe out the individual liberties that have made us a proud country, with every right to be proud.

That's more than enough moralizing. I'm not a philosopher; I'm a practical man. And that's why

I'd like to give a few practical suggestions. The political campaigns are coming. And, as I've pointed out, we know what a lot of the candidates are going to be saying. I say, let's keep them honest.

Right now, look at their declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups like this one, groups with a deep interest in good government, organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

One thing you can do is talk in advance with the communications media in this area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action.

I've quoted Thomas Jefferson before and I'll quote him just one more time. It seems that Jefferson didn't like long-winded speeches. In 1824, in a letter to the president of a debating society, he said this: "Amplification is the vice of modern oratory. It is an insult to an assembly of reasonable men, disgusting and revolting instead of persuading. Speeches measured by the hour, die with the hour." That's good advice, and I'll follow it. Thank you!

Public Affairs Department
Bethlehem Steel Corporation
Bethlehem, PA 18016

Booklet 2901 728, Printed in U.S.A.

How you can help to keep the campaign honest

There are many things you can do—either as an individual, or as a member of an organization—to help promote responsible, truthful campaigning by political candidates. We urge your full participation.

Become informed. Determine what the major issues are in this year's elections—such as Vietnam, inflation, taxes, unemployment, environment, foreign affairs, busing, and law and order. Read books, magazines, periodicals, and reports to gain background; read newspapers to follow current trends. Make a habit of watching televised news programs, and listening to radio reports. Discuss the issues with your friends, neighbors, and business associates.

In addition, find out what the candidates stand for. What are their proposals and political philosophy? What have their records been on major issues? What are their qualifications for office?

Prepare. Forewarn the communications media about possible false statements that could be made by political candidates. Also, advise newspaper publishers, editors, reporters, radio and television people, and magazine publishers of any fallacies in the political programs of candidates. Use

facts and illustrations, and give them the sources of your material.

If you work for a fairly large business organization, see to it that your sales people and legislative representatives are advised to report any false or misleading statements that come to their attention, so that appropriate rebuttal can be made. Encourage your executives to accept speaking engagements and to urge their audiences to keep candidates honest.

Be inquisitive. Scrutinize articles and speeches by candidates. When you encounter a statement that seems unlikely, or is inconsistent with your own knowledge, check on it. Your sources, of course, will vary with the subject you are researching, but the following may be useful to you: The Readers Guide to Periodical Literature, and the Public Affairs Information Service at your local library include a listing of current books, magazine and periodical articles, and government documents. Also, use encyclopedias and almanacs; informational services of chambers of commerce, and other local business associations. Keep in touch with the public affairs or public relations offices of major corporations or of national organizations such as the National Association of Manufacturers, the Chamber of Commerce of the United States, and various trade associations or technical societies. Or ask the candidate himself to provide the source of his information. If the facts contradict the statement you are researching, document your sources.

Correct the record. If you are attending an open meeting at which a political candidate—or anyone else—makes a statement you know to be wrong, stand up and question him, perhaps during the question and answer session. If that is not possible, or if you hear or read such a statement in the news media, write to the candidate, the radio and television stations or newspapers which publicized the incorrect information, and perhaps to local newspapers in areas where the statement was heard

or read. Make your communications positive in tone; cite relevant facts and figures to prove your point.

Follow up. To the extent possible, check future statements of the candidate to be sure he has corrected the wrong information he has been using. If he has, write and thank him. If not, some of the following steps might be indicated: write or wire the local, state, or national leader of the candidate's political party, asking that he or she intervene; write or telephone officials of your local news media, suggesting that they prepare an editorial on the situation and that they discuss the issue in their news articles or programs. Communicate again with the candidate, telling him of the steps you have taken and strongly urging him to correct the wrong information he is using.

Talk with people. Talk with everyone with whom you come in contact about your efforts to promote responsible campaigning. Discuss the incorrect statements that have been made, and tell your listeners who made them. Encourage them to become active in their own localities.

Finally, form "Truth Squads." Involve your friends, neighbors, church groups, business organizations, civic clubs and schools in the effort to promote truthful, honest political campaigning. Divide the research and communication work among members of the Squad and meet periodically to discuss issues and projects, and to share information. Have each participant communicate with the officials suggested above in every instance where an irresponsible or incorrect statement is identified.

Public Affairs Department
Bethlehem Steel Corporation
Bethlehem, PA 18016

Folder 2902 728, Printed in U.S.A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

AMENDED MOTION FOR PRELIMINARY INJUNCTION.

Plaintiff hereby amends his motion for preliminary injunction and asks that the Court grant a preliminary injunction against corporate defendant Bethlehem Steel Corporation *only* in accordance with a proposed preliminary injunction, findings of fact and conclusions of law submitted herewith.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia 19103
Counsel for Plaintiff.

IN THE
UNITED STATES DISTRICT COURT.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104
ON BEHALF OF HIMSELF, AND
ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS,
ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION
AND
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

TROUTMAN, *J.* October 25, 1972.

The Court, having considered the verified complaint, the answer and a stipulation of facts entered into by respective counsel and having heard oral argument, now makes the following findings of fact and conclusions of law pursuant to F. R. Civ. P. 52(a).

FINDINGS OF FACT.

1. Plaintiff resides in Philadelphia, Pennsylvania, is a United States citizen, and is registered and able to vote in the United States presidential election on November 7, 1972.

2. Plaintiff is and was at all times relevant hereto the owner of fifty shares of common stock of Bethlehem Steel Corporation.

3. Bethlehem Steel Corporation (Bethlehem) is a Delaware corporation engaged primarily in the business of steel production, with a principal office in Bethlehem, Pennsylvania.

4. Bethlehem is the second largest producer of steel in the United States, and in 1971 it had net sales of approximately $2,963,602,000 and net income of approximately $139,239,000

5. Bethlehem had on September 30, 1972 about 202,670 stockholders who owned about 44,469,541 shares of common stock, which were outstanding on that date. The market value of each share of common stock during 1972 has ranged from a high of $34⅝ to a low of $25⅞, and the closing value of a share of common stock on October 16, 1972 was $25⅞.

Plaintiff, who owns fifty shares of such common stock, has owned said stock for more than one year.

6. In connection with the September 11, 1972, mailing of a quarterly dividend to its stockholders, Bethlehem included in the mailing envelope sent to each stockholder a reprint of an advertisement (the "Advertisement") entitled, "I say, let's keep the campaign honest. Mobilize 'truth squads' . . ." (Exhibit A).

7. The advertisement appeared from on or about August 22, 1972 until September 7, 1972, in various media of national and local circulation, including "Newsweek", "Time", "U. S. News and World Report", "Business Week", "Saturday Review", "Editor and Publisher" and nineteen local newspapers in towns in which Bethlehem has plants.

8. Various magazines in which the advertisement appeared, including "Time", "Newsweek" and "U. S. News and World Report" are distributed nationally to subscribers and by sale at newsstands throughout the United States.

9. "Time", "Newsweek" and "U. S. News and World Report" are published weekly and have substantial circulation.

10. The Public Affairs Department of Bethlehem as indicated in the advertisement will send to each person on request a copy of Mr. Cort's speech entitled "Speak Out for Truth", and a copy of a folder entitled "How you can help to keep the campaign honest".

11. The placement and purchase of the advertisement and the printing and mailing of Mr. Cort's speech and the folder entitled "How you can help to keep the campaign honest" have been, and are being paid for out of the general corporate funds of Bethlehem.

12. Bethlehem may cause the advertisement to appear in the future in media of national and local circulation.

13. The mailing by Bethlehem of Mr. Cort's speech and the folder entitled "How you can help to keep the campaign honest" is continuing at present and may continue in the future. Approximately 5,500 copies of the speech and folder have been sent.

14. A Federal election is scheduled for November 7, 1972, at which voters will have an opportunity to vote for electors for the Presidency and Vice-Presidency of the United States, and for various other Federal offices, including members of Congress.

15. The advertisement, the speech and the folder do not mention by name any person currently a candidate for any local, state or Federal office, and they do not endorse or disparage the candidacy of any person currently seeking election to any local, state or Federal office.

16. The advertisement, the speech and the folder state a variety of viewpoints on issues which voters may face in the upcoming elections, without identifying any particular candidate with any particular political view.

DISCUSSION.

Beginning on August 22, 1972, the "advertisement" about which plaintiff complains appeared in various news media and was distributed to shareholders of the defendant corporation, Bethlehem Steel Corporation, on September 11, 1972. On October 16, 1972, plaintiff formally filed a complaint seeking a preliminary injunction restraining such advertisement. On October 11, 1972, at about 5 P. M., plaintiff applied for a temporary restraining order. After notice, hearing was held on October 13, 1972, and said ap-

plication was denied. Thereafter, the parties conferred and appeared before the Court on October 20, 1972, submitting a stipulation of facts in lieu of testimony, upon which we base the foregoing "findings of fact". Proposed amended findings and conclusions were submitted to the Court on October 24, 1972, and because of the coming Federal election on November 7, 1972, plaintiff seeks an immediate decision. Therefore, time does not permit the preparation and filing of an expanded and detailed discussion and opinion.

For the purpose of this application for a preliminary injunction, it is sufficient to say that a party seeking a preliminary injunction must establish by clear, positive proof the existence of four essential preconditions to the granting of injunctive relief: (1) irreparable harm to himself absent an injunction; (2) the absence of substantial harm to the defendants; (3) the absence of harm to the public interest; and (4) a likelihood that he will prevail on the merits. *Winkleman v. N. Y. Stock Exchange,* 445 F. 2d 786, 789 (3d Cir. 1971); *Nelson v. Miller,* 373 F. 2d 474, 477 (3d Cir. 1967). Failure to adequately establish at least a reasonable probability of success on the merits justifies denial of an injunction on this ground alone. *Industrial Electronics Corp. v. Cline,* 330 F. 2d 480, 482 (3d Cir. 1964).

Title 18 U. S. C. § 591, as amended, defines, as follows, the term "expenditure" as otherwise used in the Act:

"(f) 'expenditure' means—

'(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), *made for the purpose of influencing the nomination for election, or election, of any person to Federal office,* for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

'(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable to make any expenditure; and

'(3) a transfer of funds between political committees.' " (Emphasis supplied)

Thus, as defined, it contemplates a specific purpose; i.e., influencing the election of a person to Federal office. Title 18 U. S. C. § 610 then continues:

"§ 610. *Contributions or expenditures by national banks, corporations, or labor organizations.*

"As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; non-

> partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization; PROVIDED, that it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

It is a criminal statute imposing, for its violation, a fine and penalty.

Thus, at the very threshhold, the plaintiff must establish an implied cause of action under said statute. Civil actions may be implied from criminal statutes designed to protect a specific class. *Common Cause v. Democratic National Committee,* 333 F. Supp. 803 (D. D. C. 1971). The purpose of Section 610 is to assure a popularly elected government for all the people in the United States and its main concern is to "eliminate the effect of aggregated wealth in Federal elections". *Pipefitters Local Union No. 562 et al. v. United States,* — U. S. — (June 22, 1972). True, a secondary concern of Section 610 is to protect dissenting or minority shareholders, of which plaintiff is one. Thus, since the *primary* purpose of the Act was to protect the public, rather than dissenting shareholders, a substantial showing of congressional intent is required to provide an implied cause of action. Congress expressly

vested in the Department of Justice the authority to enforce the Act. The sanctions imposed are purely penal in nature. On this record, we cannot hold, as plaintiff contends, that a private cause of action must be implied because the Department of Justice resources are inadequate to enforce the Act and thereby are inadequate to protect the public interest. Neither can we assume the partisan enforcement of the Act as plaintiff suggests. We, therefore, hold that the penal sanctions imposed are exclusive and that no private cause of action is implied. *Chavez v. Freshpict Foods, Inc.,* 456 F. 2d 890 (10th Cir. 1972). For this reason alone an injunction must be denied.

The second issue arises, namely, whether the advertisement constitutes a violation of Section 610, which proscribes any expenditure or contribution to a candidate, campaign committee, political party or organization in connection with any Federal election. Section 591 defines expenditure as used in Section 610 as ". . . anything of value . . . for the purpose of influencing the nomination for election or election of any person to federal office." Here, the ostensible purpose—apparent on the face of the advertisement—is to mobilize and seek honest campaigns. Only incidentally does it seek to refute the statement of an unnamed candidate for political office. There is nothing in the Act which suggests a corporation or a labor union must sit idly by as accusations are being made against it or the industry or segment of the business community of which it is a part. The advertisement or article is not directed to the election of a specific person or persons or, indeed, of any persons to Federal office, as contemplated by 18 U. S. C. § 591(f). Neither is it directed to a specific candidate, campaign committee, political party or organization, as contemplated by 18 U. S. C. § 610.

We conclude that the purpose of the advertisement was not to influence the election of a specific candidate, but

rather to seek an honest campaign and election and, incidentally, to respond to an accusation leveled against the business community. Thus, the payment for the advertisement did not constitute an "expenditure" within the meaning of Section 591(f) and Section 610.

A third issue arises in that defendants challenge the constitutionality of the Act. We need not reach the constitutional issue. Under the facts and circumstances of this case, we have construed the term "expenditure" to exclude a situation where, as here, a corporation (or a labor union) expends its general funds to communicate to the public (a) its views as to honest campaigns and elections, an issue vital to its corporate interest and to the public; (b) its views as to a statement made by an unnamed candidate for election aimed at the community of which it is a part; and (c) without advocating the election of any particular person or party.

In thus construing the term "expenditure", we need not decide whether the statute is overbroad in that it unduly infringes upon the First Amendment rights of either corporations or labor unions.

Accordingly, on the basis of the record before us, we make and enter the following

CONCLUSIONS OF LAW.

1. The Court has subject-matter jurisdiction over Count I of the complaint, pursuant to 28 U. S. C. § 1331.

2. The Court has personal jurisdiction over defendant, Bethlehem Steel Corporation.

3. Plaintiff has failed to prove that there is a likelihood of success on the merits, in that:

(a) plaintiff has no private right of action under 18 U. S. C. § 610;

(b) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder are not "contributions or expenditures" within the meaning of 18 U. S. C. § 610;

(c) the expenditures made by Bethlehem Steel in connection with the advertisement, the speech and the folder are not "expenditures" made for "the purpose of influencing the nomination for election, or the election of any person to Federal office" and, hence, are not "expenditures" within the meaning of 18 U. S. C. § 591(f)(1).

(d) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech, and the folder did not constitute "active electioneering directed at the general public on behalf of a candidate in a Federal election" as defined in the legislative history to the recent amendment of 18 U. S. C. § 610; Congressional Record, November 30, 1971, H 11477, 11478;

(e) to enjoin the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech, and the folder would prevent a corporation from seeking an honest campaign and election and refuting a statement made by an unidentified candidate, which is adverse to its interest, thereby giving rise to grave First Amendment issues;

(f) under the facts and circumstances of this case, 18 U. S. C. § 610 must be narrowly construed to avoid an overbroad application infringing on a corporation's (and labor union's) First Amendment right to seek an honest campaign and to refute statements on issues of crucial concern to it and to the public, thus preventing a public debate on such issues.

4. Plaintiff has failed to prove that injunctive relief would not cause substantial harm to defendants.

5. Plaintiff has failed to prove that injunctive relief would not be harmful to the public interest.

6. In failing to prove a likelihood of success on the merits, plaintiff has failed to prove that irreparable harm would result if an injunction is not granted.

A preliminary injunction will be denied.

ORDER.

AND NOW, this 25th day of October, 1972, IT IS ORDERED that plaintiff's motion for a preliminary injunction will be, and the same is hereby, DENIED.

/s/ E. MAC TROUTMAN, *J.*

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation



"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business—you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we aren't already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write: Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016.

This Advertisement is scheduled to appear in: Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and 19 Plant Town Newspapers, the Washington Post, and the Wall Street Journal.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT, ET AL.

NOTICE OF APPEAL.

Notice is hereby given that plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the order denying plaintiff's motion for a preliminary injunction entered in this action on October 27, 1972.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia, Pa. 19103
Attorney for Plaintiff-Appellant.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1984

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104

ON BEHALF OF HIMSELF,
AND ON BEHALF OF

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
Appellant

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES,

ROBERT B. HOBBS
GEORGE P. JENKINS

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORTATION,
Defendants

AND

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
Nominal Defendant

(D. C. Civil Action No. 72-1925)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued December 15, 1972

Before SEITZ, *Chief Judge,* and ALDISERT and
ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 5, 1973)

CLETUS P. LYMAN, Esq.
Phila., Pa.
Attorney for Appellant

EDWIN P. ROME, Esq.
JEROME R. RICHTER, Esq.
WILLIAM H. ROBERTS, Esq.
Phila., Pa.
Attorneys for Appellees

PER CURIAM:

This is an appeal from a denial of a request for preliminary relief seeking to enjoin Bethlehem Steel from furnishing funds for the publication and dissemination of copies of a speech made by the corporation's president. Appellant alleged that this practice offended 18 U. S. C. §§ 591, 610, governing the conduct of federal elections and political activities. We affirm the denial of the request for a preliminary injunction. Our holding is narrowly limited. We affirm solely because we view as not clearly erroneous the district court's finding that appellant would not be irreparable harmed by the denial of his request.

Although the court reached other legal considerations which facially would seem to preclude appellant from proceeding to final hearing, we were assured at oral argument by counsel for appellees that he considered those conclusions to have been preliminary only and limited to the context of the request for preliminary relief. He conceded that appellant would be free to present anew his original contentions in the district court as the case proceeds to final adjudication. We therefore conclude that appellant is not foreclosed from reasserting at final hearing his contentions of standing and statutory construction of 18 U. S. C. §§ 591, 610 and, thus, do not meet these questions nor the issue of mootness.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1984.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104

ON BEHALF OF HIMSELF,
AND ON BEHALF OF

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,

Appellant,

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES

ROBERT B. HOBBS
GEORGE P. JENKINS

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORTATION,
Defendants

AND

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
Nominal Defendant

(D. C. Civil No. 72-1925)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ALDISERT and ROSENN, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 27, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ THOMAS F. QUINN,
Clerk.

January 5, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

ON BEHALF OF HIMSELF
AND ON BEHALF OF

BETHLEHEM STEEL CORPORATION,
Plaintiff,

v.

STEWART S. CORT, ET AL.,
Defendants.

MOTION FOR SECURITY FOR EXPENSES.

Defendants, Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, C. Thompson Stott, Ivor D. Sims, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs, George P. Jenkins, and Bethlehem Steel Corporation ("Bethlehem") by their attorneys, Blank, Rome, Klaus & Comisky, respectfully move your Honorable Court pursuant to Act of May 5, 1933, P. L. 364, Art. V, § 516, added Act of August 27, 1963, P. L. 1355, § 1, as amended Act of July 20, 1968, P. L. —, No. 216 § 32 (15 P. S. § 1516, Pennsylvania Business Corporation Law, § 516B), for an Order requiring plaintiff to post security for expenses in the above captioned matter.

The following reasons are advanced in support of this Motion:

1. This is a suit brought to enforce secondary rights on the part of a stockholder against the directors of Bethlehem and Bethlehem.

2. Plaintiff is a holder of 50 shares of common stock of Bethlehem, which is less than five (5) percent of the outstanding shares of such common stock. Bethlehem had on January 5, 1973, about 44,468,446 shares of common stock outstanding, and the closing value of a share of common stock on January 5, 1973 was $29½.

3. Each individual defendant is a director of Bethlehem and at all times alleged in the Complaint, acted in good faith, in a manner he reasonably believed to be in the best interests of Bethlehem, and his conduct was not unlawful. Furthermore, in so acting, each defendant was neither negligent nor guilty of misconduct in performance of his duties to Bethlehem. Bethlehem and the directors deny any unlawful, improper or wrongful acts as alleged in the Complaint.

4. Plaintiff has made no effort to verify the truth of the material allegations made in his Complaint, and he has no reasonable belief in the truth thereof. This law suit is of a frivolous and harassing nature, in which plaintiff has no real likelihood of success.

WHEREFORE, defendants respectfully move Your Honorable Court to enter an Order requiring plaintiff to post bond as security for reasonable expenses in the amount of $100,000.00.

BLANK, ROME, KLAUS & COMISKY,
By: /s/ EDWIN P. ROME,
Edwin P. Rome,
JEROME R. RICHTER,
Attorneys for Defendants.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1984.

RICHARD A. ASH, ETC.
Appellant,

v.

STEWART S. CORT, ETC., ET AL.

ORDER SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, and HUNTER, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ ALDISERT,
Judge.

Dated: January 31, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH,
ON BEHALF OF HIMSELF AND ON BEHALF OF
BETHLEHEM STEEL CORPORATION

v.

STEWART S. CORT, ET AL.

ORDER.

TROUTMAN, *J.*

AND Now, this 7th day of March, 1973, upon consideration of this written motion and briefs submitted by the parties, IT IS ORDERED that defendants' motion for security for expenses as it relates to Count I of plaintiff's complaint is DENIED. As to Count II, IT IS FURTHER ORDERED that the plaintiff post a bond with the Clerk of this Court in the amount of $35,000.00 as security for expenses pursuant to the provisions of Section 516(b) of the Pennsylvania Business Corporation Act, 15 P. S. §1516 and that such bond be posted within ten (10) days of the date of this order. Construing Section V of plaintiff's preliminary memorandum as a motion for leave to amend the complaint, IT IS FURTHER ORDERED that such motion is GRANTED. IT IS FURTHER ORDERED that defendants' objections to plaintiff's interrogatories and request for documents as they relate to this motion are SUSTAINED.

/s/ E. MAC TROUTMAN, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104

ON BEHALF OF HIMSELF,
AND ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,

Plaintiff,

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES,

ROBERT B. HOBBS
GEORGE P. JENKINS,

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORTATION,
Defendants

AND

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
Nominal Defendant

FIRST AMENDED COMPLAINT.

1. Plaintiff Richard Ash is an individual residing at the Plaza Apartment, 18th & Benjamin Franklin Parkway, Philadelphia, Pennsylvania.

2. Nominal defendant, Bethlehem Steel Corporation (Bethlehem Steel) is a Delaware corporation with principal office located at 701 East Third Street, Bethlehem, Pennsylvania, engaged, *inter alia,* in the business of steel production, distribution and sale.

3. Bethlehem Steel is the second largest United States steel producer with annual gross sales in excess of $3.0 billion annually. It maintains plants and offices for the carrying out of its business throughout the United States, including the Eastern District of Pennsylvania.

4. Defendants Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, Ivor D. Sims, C. Thompson Stott, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs and George P. Jenkins, are individuals residing within the United States, who

comprise the Board of Directors of Bethlehem Steel, Cort being the Chairman of said Board. Foy, Bickford, Broeker, Reed, Sims and Stott serve additionally as top echelon executives of said company; Foy as its President; and the others as Executive Vice Presidents.

5. By virtue of their said positions with Bethlehem Steel, defendants control the policy making of the corporation, its implementation of such policies, and the disbursement of corporate funds pursuant to and in furtherance of such policies.

6. Bethlehem Steel is a publicly held corporation whose stock is traded and listed on the New York Stock Exchange. Its stock is widely distributed to in excess of 200,000 holders, a substantial number of whom live within the United States and within the Eastern District of Pennsylvania.

7. Plaintiff is, and was at all times herein material, the owner of 50 shares of Bethlehem Steel stock. He is, in addition, a citizen of the United States, registered and qualified to vote in federal and state elections, including the 1972 United States presidential election.

8. Plaintiff brings this action in an individual capacity as a shareholder, a United States citizen and a qualified member of the United States electorate as aforesaid and derivatively on behalf of Bethlehem Steel and alleges that he is well able to fairly, ably and effectively represent the rights and interests of said corporation.

9. No demand has been made upon the Directors of Bethlehem Steel to seek similar redress directly, because said Directors are involved in and responsible for the wrongdoing out of which plaintiff's suit arises.

10. No request for concerted action has been made to plaintiff's fellow shareholders in Bethlehem Steel, because they are too numerous and too widely scattered to make such request practicable.

11. This action is not a collusive one to confer jurisdiction upon a court of the United States which it would not otherwise have.

12. This Complaint arises out of alleged violation by defendants of the criminal statutes of the United States governing elections and political activities, commonly known as the Federal Corrupt Practices Act, specifically Title 18, Section 610, U. S. C. A. of said Act, and the private remedy for redress of grievances implied under said Act. Jurisdiction is involved under Title 28, Section 1331, U. S. C. A., the amount in controversy exceeding the sum of $10,000, exclusive of interest and costs.

13. At some time in 1971 or 1972, defendants entered into a plan involving the utilization of Bethlehem Steel's resources, including the expenditure of its funds, in connection with the 1972 United States presidential election.

14. The ultimate purpose of said plan was to influence the United States electorate to help bring about a Republican Party victory in said election. This purpose was solely in furtherance of the individual interests and beliefs of defendants and was in violation of state and federal law, and in derogation of the rights of the United States public, and of the approximate one half of the shareholders of Bethlehem Steel that are registered members of the Democratic political party.

15. Thereafter, in furtherance of said plan and purpose, defendants caused corporate resources to be utilized, including the expenditure of substantial funds in connection

with said political campaign, including, *inter alia,* their causing to be prepared and disseminated at corporate expense, an advertisement entitled "I Say Let's Keep the Campaign Honest. Mobilize 'Truth Squads' . . .", attributed to defendant Cort. (A copy of said advertisement is attached hereto and made part hereof as Exhibit "A".)

16. Said advertisement was communicated to the United States' electorate as aforesaid, *inter alia,* by insertion in various magazines of national circulation, including Newsweek, Time, U. S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and in various local newspapers, and by a direct mailing, to Bethlehem Steel shareholders.

17. The aforesaid actions by defendants have been and are in violation of said Federal Election law, which states *inter alia:*

> "It is unlawful for . . . any corporation whatever . . . to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for. . . ." Title 18, Sec. 610, U. S. C. A.

18. The said actions by defendants are, *a fortiori,* unlawful in that they involve the utilization of corporate resources for partisan political purposes in connection with said presidential election, pursuant to defendants' plan and purposes.

19. The said advertisement is blatantly partisan on its face, in that it in essence calls for the mobilization of "truth squads" to keep the campaign honest, on the basis of the following factors extracted therefrom:

"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

* * *

"As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: 'The time has come for a tax system that says to big business—you must pay your fair share.'" (Exhibit "A")

All of which factors can only reasonably be imputed to activities of Democratic candidates and programs and policies that are identified by the public with the Democratic party and its current candidate for the presidency.

20. Defendants have caused an unlawful expenditure by Bethlehem Steel in connection with the 1972 Presidential Election Campaign, as aforesaid, of corporate funds and other resources with a total value in excess of $500,000.

21. Defendants presently intend to cause Bethlehem Steel to make further similar and unlawful expenditures of corporate resources in connection with future federal elections.

WHEREFORE, plaintiff respectfully requests that this Honorable Court enter:

(A) Declaratory judgment against defendants jointly and severally finding their conduct as alleged unlawful.

(B) An Order temporarily and permanently restraining and enjoining defendants from any further expenditures or contributions in connection with any federal election.

(C) Judgment against defendants jointly and severally and in favor of Bethlehem Steel in an amount in excess of $500,000 compensatory damages.

(D) Judgment against defendants jointly and severally and in favor of plaintiff corporation for punitive damages commensurate with their wrongdoing.

(E) Judgment against defendants jointly and severally and in favor of plaintiff for costs of suit, including reasonable attorneys' fees.

(F) Such other and further and different relief as appears proper under the circumstances.

CLETUS P. LYMAN,
1612 Latimer Street,
Philadelphia 19103
Attorney for Plaintiff.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

RICHARD A. ASH, being duly sworn according to law, deposes and says that he is the plaintiff in the within complaint and is familiar with the facts set forth therein which are true and correct to the best of his knowledge, information and belief.

/s/ RICHARD A. ASH
Richard A. Ash.

Sworn to and subscribed to before me this 19th day of March, 1973.

/s/ NANCY H. BERGMAN
Nancy H. Bergman, Notary Public
Philadelphia, Philadelphia County
My Commission expires May 6, 1976
Member, Pennsylvania Association of Notaries

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation



"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business—you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we are not already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write: Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016

This Advertisement is scheduled to appear in: Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and 19 Plant Town Newspapers, the Washington Post, and the Wall Street Journal.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

MOTION.

RICHARD A. ASH,
Plaintiff,

v.

STEWART S. CORT, ET AL.,
Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Defendants move the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in the defendants' favor dismissing the claim alleged in Count I of the Complaint on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law, and dismissing the claim alleged in Count II of the Complaint on the ground that, defendants being entitled to judgment as to Count I, the Court lacks jurisdiction over the subject matter of the pendent claim alleged in Count II.

Of Counsel:
BLANK, ROME, KLAUS
& COMISKY,
1100 Four Penn Center
Plaza,
Philadelphia, Pennsylvania
19103

/s/ EDWIN P. ROME,
Edwin P. Rome,
JEROME R. RICHTER,
WILLIAM H. ROBERTS,
Attorneys for Defendants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH,
Plaintiff,

v.

STEWART S. CORT, ET AL.,
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Of Counsel:
BLANK, ROME, KLAUS & COMISKY,
Four Penn Center Plaza,
Philadelphia, Pennsylvania.
19103

EDWIN P. ROME,
JEROME R. RICHTER,
WILLIAM H. ROBERTS,
Attorneys for Defendants.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH,

Plaintiff,

v.

STEWART S. CORT ET AL.,

Defendants.

MOTION FOR AN EVIDENTIARY HEARING ON THE QUESTION OF PLAINTIFF'S STANDING AND FOR CONTINUATION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Plaintiff by his attorney hereby moves the Court for an evidentiary hearing on the question of plaintiff's standing and for continuation of defendants' motion for summary judgment. More particularly, plaintiff requests:

1. That a jury be empaneled to try all factual issues material to plaintiff's standing;

2. That plaintiff be given the opportunity to subpoena witnesses in his behalf;

3. That defendants' motion for summary judgment be continued until such time as the Court has ruled on plaintiff's standing.

In support of plaintiff's motion, plaintiff asserts as follows:

1. That standing is the principal question raised by defendants in their motion for summary judgment;

2. That this Court has previously observed that the question of standing is a factual question in its discussion of plaintiff's motion for preliminary injunction [entered October 30, 1972].

3. That plaintiff has not had an opportunity to develop any facts of record related to the issue of standing and that evidence material to this issue is not in the present possession of plaintiff but may be secured only by testimony of witnesses who must be produced by compulsory process of this Court; and,

4. That plaintiff has at all times reserved his right to trial by jury of all material facts by endorsing "JURY TRIAL DEMANDED" on his Complaint and Amended Complaint.

WHEREFORE, plaintiff requests that his motion be granted and that an evidentiary hearing be held and that defendants' motion for summary judgment be continued pending a ruling on plaintiff's standing.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia. 19103
Attorney for Plaintiff.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH,

Plaintiff,

v.

STEWART S. CORT ET AL.,

Defendants.

AFFIDAVIT.

RICHARD A. ASH, being duly sworn, deposes and says as follows:

1. That he is plaintiff in the above action and that he is a member of the bar of this Court;

2. That he makes this affidavit in support of plaintiff's motion for an evidentiary hearing on the question of plaintiff's standing and for continuation of defendants' motion for summary judgment.

3. That he has investigated facts material to the question of plaintiff's standing and that he has established the following factual conclusions:

a. the Justice Department of the United States has historically failed to enforce the election laws of the

United States including Title 18 U. S. C. Section 610 and its predecessor statutes;

b. the Justice Department was intentionally made subservient to the reelection goals of the Republican Nixon administration so as to render it inadequate to enforce the election laws including Title 18 Section 610 in the 1972 presidential election;

c. the Justice Department lacks the requisite staff and resources to effectively enforce the election laws of the United States including Title 18 Section 610.

d. the General Accounting Office assumes no responsibility for investigation of violations or enforcement of Title 18 U. S. C. Section 610.

4. That he has located through documentary research and personal interview in excess of ten witnesses in the United States who have testimony supporting the above factual conclusions whom he will produce by compulsory process of this Court if an evidentiary hearing is granted. A partial list of such witnesses is attached hereto as Exhibit A.

/s/ RICHARD A. ASH,
Richard A. Ash.

Sworn to and subscribed before me this 26 day of June, 1973.

/s/ NANCY H. BERGMAN

Nancy H. Bergman Notary Public
Philadelphia, Philadelphia County
My Commission Expires May 6, 1976
Member, Pennsylvania Association of Notaries

Exhibit A.

JOHN W. GARDNER
PHILIP H. HUGHES
JAMES H. DUFFY
JOHN W. DEAN, III
JEB STUART MacGRUDER
JOHN MITCHELL
RICHARD KLEINDIENST
JOHN J. MARDIAN
ROBERT HIGGINS
ELMER STAATS
HENRY E. PETERSON
HOWARD HUNT
JAMES McCORD

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

ORDER.

AND NOW, this 11th day of July, 1973, upon a finding that the issue whether plaintiff has an implied right to prosecute a cause of action under 18 U. S. C. § 610 is a question of law to be determined by the Court based upon, *inter alia,* the language, legislative history and purpose of the Act, IT IS ORDERED that plaintiff's motion for an evidentiary hearing and for continuation of defendants' motion for summary judgment is DENIED. In addition, upon consideration of the entire record, oral argument and briefs submitted by the parties and upon a finding (1) that no legal basis has been presented by the plaintiff to justify the relief sought, and (2) that no genuine issues of material facts exist, IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

/s/ E. MAC TROUTMAN, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH,

Plaintiff

v.

STEWART S. CORT ET AL.,

Defendants.

NOTICE OF APPEAL.

Notice is hereby given that plaintiff Richard A. Ash hereby appeals to the United States Court of Appeals for the Third Circuit from the order of the above Court denying plaintiff's motion for an evidentiary hearing and for continuation of defendants' motion for summary judgment and granting defendants' motion for summary judgment, entered July 11, 1973.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia. 19103
Attorney for Plaintiff.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH,

Appellants

v.

STEWART S. CORT, ET AL.,

Appellees.

DESIGNATION OF PARTS OF RECORD TO BE INCLUDED IN APPENDIX AND STATEMENT OF ISSUES TO BE PRESENTED FOR REVIEW.

TO APPELLEES IN THE ABOVE CAPTIONED ACTION:

Appellant hereby designates parts of the record to be included in the appendix and states the issues to be presented for review in the above captioned appeal. If you deem it necessary to direct the particular attention of the Court to parts of the record not designated herein, you should serve on appellant a designation of these parts within ten days of service hereof pursuant to Fed. R. App. P. 30(b).

PARTS OF RECORD TO BE INCLUDED IN APPENDIX.

1. Docket entries
2. Amended Complaint

3. Proposed answer to Amended Complaint.
4. Motion of Plaintiff for Preliminary Injunction
5. Amendment to Plaintiff's Motion for Preliminary Injunction
6. Decision of Court below denying plaintiff's Motion for a Preliminary Injunction, Order
7. Stipulation of Agreed Upon Facts
8. Notice of Appeal from Denial of Preliminary Injunction
9. Opinion of Court of Appeals affirming denial of preliminary injunction
10. Defendants' Motion for Summary Judgment
11. Two-page index to Memorandum of Law in Support of Defendants' Motion for Summary Judgment
12. Plaintiff's Motion for an Evidentiary Hearing and for Continuation of Defendants' Motion for Summary Judgment, accompanying affidavit of plaintiff
13. Order of court below of July 11, 1973, denying plaintiff's motion for an evidentiary hearing etc. and granting defendants' motion for summary judgment
14. Notice of appeal from order (#13 above).

ISSUES TO BE PRESENTED FOR REVIEW.

1. Does a party who is both a shareholder of a corporation and a member of the electorate qualified to vote in a federal election have standing to seek injunctive relief, declaratory relief or damages on behalf of the corporation based on a complaint against the directors of the corporation alleging that directors spent corporate funds in violation of Title 18 U. S. C. Section 610?

2. Could the court have concluded that no genuine issues of material facts exist in light of the broad allegations of the amended complaint and the limited scope of the record before the court?

3. Is the expenditure of corporate funds for the promulgation of advertising in the manner and of the nature complained of violative of Title 18 U. S. C. Section 610?

4. Is Title 18 U. S. C. Section 610 as sought to be enforced violative of the United States Constitution, Amendment I?

Dated: September 6, 1973

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia. 19103
Attorney for Plaintiff-Appellant.

To:

Edwin P. Rome, Esq.
Four Penn Center Plaza
Philadelphia. 19104

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION,

v.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

Appellees,

and

BETHLEHEM STEEL CORPORATION,
Nominal Defendant

Richard A. Ash,

Appellant

(D. C. Civil Action No. 72-1925)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 17, 1974

Before SEITZ, *Chief Judge,* HASTIE and ALDISERT, *Circuit Judges.*

Cletus P. Lyman
Attorney for Appellant
1612 Latimer Street
Philadelphia, Pennsylvania

Edwin P. Rome
Jerome R. Richter
William H. Roberts
Attorneys for Appellees

Of Counsel
Blank, Rome, Klaus & Comisky
Four Penn Center Plaza
Philadelphia, Pennsylvania 19103

OPINION OF THE COURT

(Filed April 16, 1974)

SEITZ, *Chief Judge.*

Plaintiff, a stockholder in Bethlehem Steel Corporation and registered to vote in federal elections, appeals from an order of the District Court for the Eastern District of Pennsylvania denying his request for an evidentiary hearing and granting defendants' motion for summary judgment. Defendants are directors of Bethlehem. The gravamen of plaintiff's complaint is that defendants caused Bethlehem to expend money to help secure the election of the Republican party's 1972 presidential candidate. Plaintiff asserts that the corporate expenditures, for an advertisement and a pamphlet, violated a federal prohibition on corporate campaign spending, 18 U. S. C. § 610, (1970) as amended (Supp. II 1972). Plaintiff, seeking an injunction and damages, invokes federal jurisdiction over this claim under 28 U. S. C. § 1331 (1970), making the requisite jurisdictional allegations.

The district court's order granting summary judgment merely recited that no material factual dispute existed and that defendants were not liable to plaintiff for the claimed violation of federal law. We presume that this assertion was bottomed on the findings and conclusions relied upon by the district court to support its earlier denial of a preliminary injunction. See 350 F. Supp. 227 (E. D. Pa. 1972). Defendants argue on appeal the propriety of those findings and conclusions and urge that the summary judgment be affirmed on that basis. The major points of the district court's decision are that plaintiff would have no cause of action from defendants' violation of 18 U. S. C. § 610 (1970), as amended (Supp. II 1972), and that, in any event, defendants did not violate § 610.

I.

Before addressing the points urged by defendants to justify and plaintiff to attack summary judgment, we must consider two matters of justiciability.

Mootness.

In affirming the district court's earlier denial of a preliminary injunction, we limited our decision narrowly, holding only that the court's finding of no irreparable harm to plaintiff from denying the injunction was not clearly erroneous. 471 F. 2d 811 (3d Cir. 1973). At that time, however, we noted that the question of mootness would have to be examined at a later point in these proceedings. *Id.* at 812. As originally drawn, plaintiff's complaint focused on the 1972 presidential election and sought to prevent corporate expenditures from influencing that election. That election is now history. Nonetheless, plaintiff alleges that defendants intend to make similar expenditures in future elections, and defendants, far from denying this, hotly defend their right to do so.

Controversies concerning elections often have presented mootness problems. See, e.g., *Hall v. Beals,* 396 U. S. 45 (1969); *Moore v. Ogilvie,* 394 U. S. 814 (1969). These problems arise since election controversies almost always are spawned shortly before the election, seek prospective relief directed to the election, and reach appellate courts only after the election. Where the basis of such a controversy remains after an election and where the dispute is likely to recur, the case will not be found moot, even where prospective relief alone is sought. *Moore v. Ogilvie, supra* at 816. When this case was before us on appeal of the preliminary injunction denial, the complaint asserted pendent federal jurisdiction over a claim arising under state law; although the complaint was ambiguous, it apparently sought injunctive relief for defendants' alleged violation of federal law and, on behalf of the corporation, damages for the claimed state law violation. Our concern with mootness arose in this context.

Were plaintiff's federal claim pressed solely to secure injunctive relief, we would be required to determine whether plaintiff's bare allegation of defendants' intention to make future similar expenditures would support review, given no showing of a consistent pattern of such conduct and no assurance of plaintiff's continued ownership of Bethlehem stock. After proceedings resumed in the district court, however, the plaintiff amended his complaint and now clearly demands, in addition to injunctive relief, damages on behalf of the corporation for violation of § 610.[1] Even if plaintiff has no live claim for injunctive

1. Plaintiff in his amended complaint has dropped the allegations contained in the state law count of his original complaint. One allegation from the federal count of the original complaint and carried over verbatim in the amended version, however, declares, without elaboration that defendants violated both state and federal law. Defendants, presuming that plaintiff thus had not abandoned his state claim, moved for summary judgment on the federal claim and dis-

relief, the dispute over damages renders this controversy justiciable. See *Powell v. McCormack*, 395 U. S. 486, 495-500 (1969). We need not decide whether plaintiff's claim would be moot if he did not seek damages as well as an injunction.[2]

Question also is raised concerning plaintiff's standing to prosecute this action. As a constitutional matter, all that is required for standing is that the plaintiff have been personally injured or be threatened with such injury and that the injury be directly related to plaintiff's legal claim. *Flast v. Cohen*, 392 U. S. 83, 101 (1968); *Baker v. Carr*, 397 U. S. 186, 204 (1962). Plaintiff alleges economic injury, as a stockholder whose interest in Bethlehem is worth less than it would be had defendants not caused the challenged expenditures to be made, and further injury as a citizen and voter whose ability to secure a responsive federal government has been lessened. While these injuries, tangible and intangible, may be small, they are personal to plaintiff, directly related to his claim, and may be remedied by the injunctive and damage relief sought; hence they are sufficient to support plaintiff's standing. See *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U. S. 669, 685-89 (1973), and cases cited *id.* at 689, n. 15.

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1. (Cont'd.)
missal of plaintiff's pendent state claim for want of jurisdiction following judgment for defendants on the only federal matter. The district court does not mention plaintiff's state claim, but merely grants defendants' motion. We assume that if plaintiff did not abandon his state law claim, the district court's order dismissed that claim for want of federal jurisdiction but do not reach the dismissal's propriety.

2. Since the controversy between plaintiff and defendants is not moot, the viability of plaintiff's claim for injunctive relief must be determined, if plaintiff prevails on the merits, according to settled principles controlling the district court's discretion to grant or withhold injunctive relief. *See* J. Moore, 7 Moore's Federal Practice Para. 65.18[3] (2d ed. 1969).

Plaintiff's standing is not defeated by the fact that his injuries are shared by countless others. Although the Supreme Court's language in *Frothingham v. Mellon*, 262 U. S. 447, 487 (1923), indicated that an injury to many might confer standing to none, *Flast* intimates that *Frothingham* stated policy, not constitutional dogma, *Flast v. Cohen, supra* at 93-94, and *SCRAP* declared that standing is not lost because the harm asserted is universally shared, *United States v. SCRAP, supra* at 686-88. Finally, because we are asked not to review administrative action but to adjudicate private rights, we need not determine whether the statute asserted to provide plaintiff's cause of action places him outside the class permitted to invoke our processes. Cf. *Davis v. Romney*, Nos. 73-1249 & 73-1420, slip op. at 3-5 (3d Cir. 1974); compare *Flast v. Cohen, supra* at 101-06, and *Baker v. Carr, supra* at 204-08, with *Sierra Club v. Morton*, 405 U. S. 727, 733 (1972), and *Association of Data Processing Service Organizations v. Camp*, 397 U. S. 150, 153-54 (1970). Alleging personal injury from defendants' violation of a federal statute, plaintiff may invoke our jurisdiction under 28 U. S. C. § 1331 (1970); questions of statutory construction will be met in determining whether plaintiff has stated a cause of action and in ruling on the merits of his claim.

II.

The district court's decision that defendants were entitled to judgment as a matter of law rested on several legal conclusions, among them that plaintiff failed to state a cause of action. Plaintiff relies upon 18 U. S. C. § 610 (1970), as amended (Supp. II. 1972), as providing his cause of action. Section 610, *inter alia*, makes it "unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with any [federal] election . . .,"

and provides criminal penalties for its violation. Plaintiff contends that, although it expressly provides only penal sanctions, § 610 "implies" a cause of action in his favor.

Standards for Implied Cause

To find a cause of action "implied" in a statute, we must determine (1) that the provision violated was designed to protect a class of persons including the plaintiff from the harm of which plaintiff complains and (2) that it is appropriate, in light of the statute's purposes, to afford plaintiff the remedy sought. *Bivens v. Six Unknown Named Agents,* 403 U. S. 388, 395-97 (1971); *Wyandotte Co. v. United States,* 389 U. S. 191, 200-02 (1967); *J. I. Case Co. v. Borak,* 377 U. S. 426, 431-35 (1964). Finding an implied cause pursuant to these criteria is not entirely an exercise in divining legislative intent. Certainly, legislative intent is relevant; where the legislature clearly has indicated its intent to grant or withhold a cause of action, implicitly or explicitly, courts will give effect to that intent. E.g., *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 42 U. S. L. W. 4132, 4134-35 (U. S. January 9, 1974). Absent some reasonably clear indication of legislative attention to the possible creation of a cause of action, however, courts ascertain the policies underlying the substantive law and determine the propriety, as a means of effectuating those policies, of affording litigants a particular remedy. *Bivens v. Six Unknown Named Agents, supra* at 395-97 (opinion of the Court), and 402-03, n. 4 (Harlan, J., concurring); *Holloway v. Bristol-Meyers Corp.,* 485 F. 2d 986, 989-99 (D. C. Cir. 1973).

We are urged to find that this process of judicial policy consideration to determine whether an "implied" cause of action can be asserted was rejected by the Supreme Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra* (hereinafter "*Amtrak*"). Relying on the maxim *expressio unis est exclusio alterius* [expression of one thing is exclusion of others], the Court declared in *Amtrak* that ". . . when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Id.* at 4134. This rule of statutory construction does not alter the process used to determine if a cause should be inferred in the absence of statutory language indicating legislative intent; rather, it aids the court merely in determining when legislative intent to preclude a remedy can be fairly implied.[3]

For the *Amtrak* rule to apply, the statute must expressly provide the plaintiff a remedy that may logically be said to be exclusive. In *Amtrak,* the remedy expressly provided to correct the harm of which plaintiffs complained was a civil action prosecuted by the Attorney General. 45 U. S. C. § 547 (1970). In the instant case, no express civil action is provided to remedy plaintiff's, or any other, alleged injury.[3a] Only a criminal sanction is expressly pro-

3. The extent to which the Supreme Court relied on the rule of statutory construction in *Amtrak* is unclear. After announcing the rule, the Court went on to find evidence of a clear legislative intent to withhold the remedy sought, National R. R. Pass. Corp. v. National Ass'n of R. R. Pass., 42 U. S. L. W. 4132, 4134-35 (U. S. Jan. 9, 1974); the Court also examined the policies, as it conceived them, behind the "Amtrak Act", Railroad Passenger Service Act of 1970, 45 U. S. C. §§ 501, *et seq.* (1970), and found that implication of a private remedy there would be inconsistent with those policies, *id.* at 4135-36.

3a. Judge Aldisert notes that, in contrast to title II of the Federal Election Campaign Act of 1971, amending *inter alia* § 610, title III expressly provides a civil cause of action to the Attorney General. This provision referred to by Judge Aldisert allows the Attorney General to institute a civil action for violation of certain reporting and disclosure requirements imposed on candidates and campaign committees. These requirements were first imposed by the 1971 Act and criminal penalties for their violation were first provided in the 1971 Act.

Provision of this civil remedy may well bar inference of a private remedy for violation of these reporting and disclosure requirements.

vided for violation of § 610. Courts have consistently held that statutes providing for criminal liability do not preclude assertion of private causes of action. E.g., *Wyandotte Co. v. United States, supra* at 200-02; *Texas & Pacific Railway Co. v. Rigsby,* 241 U. S. 33, 39-41 (1916). In *Rigsby* the Supreme Court, inferring a private cause of action for violation of a criminal provision, distinguished "remedial" from "penal" application of a statute. *Id.* at 41. Thus, since § 610 cannot be said to provide any remedy for the alleged harm to plaintiff here, *Amtrak* would not preclude finding an implied cause.

Statutory Design

Our inquiry, then, must be, first, whether § 610 was designed to protect plaintiff from the harm he alleges. Section 610 is the end-product of a series of enactments limiting campaign giving and spending. See *United States v. UAW,* 352 U. S. 567, 570-84 (1957). In discussing the seminal federal limitation on corporate campaign contributions, carried forward into the present § 610, the Supreme Court stated that it was "motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials have no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." *United States v. CIO,* 335 U. S. 106, 113 (1948) [footnotes omitted].

3a. (Cont'd.)
We do not, however, believe that any intent to bar the remedies sought here can be inferred from the 1971 Act's grant of a civil, as well as a criminal, action for violation of conduct first proscribed in 1971 and its failure to grant any civil remedies for conduct prohibited since 1907. Amtrak certainly does not require that such an inference be drawn from the 1971 Act's amendment of longstanding criminal provisions coincidentally joined, albeit in separate titles, with promulgation of new civil and criminal actions.

As a voter and citizen, plaintiff is within the class Congress sought to protect by prohibiting corporate expenditures in campaigns for federal office; Congress, in the various enactments embodied in § 610, declared its view that such expenditures reduced the ability of voters to secure a government responsive to their wishes and increased the likelihood of governmental actions favoral' to particular economic blocs but inimical to the general welfare. *Id.;* 117 Cong. Rec. 43379-81 (1971) (remarks of Congressman Hansen).

As a stockholder, plaintiff is within the class secondarily protected by § 610, which keeps control over political contributions in his hands and not in those of corporate managers or directors. *Id.;* 117 Cong. Rec. 43384-85 (remarks of Congressman Thompson). The harm to plaintiff as a voter and citizen, while not set forth explicitly in his complaint, is presumably the intangible harm foreseen by Congress. The alleged harm to plaintiff and other Bethlehem stockholders is the loss of over one-half million dollars from the corporation's treasury for the challenged expenditures.[4] Clearly plaintiff satisfies the first requirement for determining a cause of action to be implied in § 610.

Defendants contend, however, that Congressional intent to protect voters, citizens and stockholders does not satisfy the implied cause test. First, defendants argue that § 610 primarily protects not voters and citizens but the public in general and that a cause of action will only be implied to protect members of a specific, limited class. We

4. In focusing on the harm to plaintiff and the propriety of according him a remedy, we are aware that damages are sought not for plaintiff as an individual stockholder but, in the form of a derivative action, for all injured stockholders. Where stockholders suffer injury jointly from violation of federal rights, a derivative action may be an implied remedy. *See* Drachman v. Harvey, 453 F. 2d 722, 736-38 (2d Cir. 1972) (in banc).

reject defendants' argument that provisions designed for the protection of the entire American public cannot give rise to implied causes. See *Bivens v. Six Unknown Named Agents, supra* (finding a private cause of action implied in the Fourth Amendment's protection of "[t]he right of the people to be secure . . . against unreasonable searches and seizures . . . ."). The breadth of the protected class is, however, relevant to the propriety of allowing criminal sanctions, rather than private actions, to enforce a statutory prohibition and will be considered below.

Second, defendants argue that no cause of action may be implied to protect plaintiff *qua* stockholder because such protection was only a secondary purpose of § 610. Although it may be improper to infer a cause of action from a statute only incidentally protecting plaintiff, the Supreme Court has indicated that protection of stockholders was not merely an incidental purpose of § 610, *United States v. CIO, supra* at 113, and protection of plaintiff need not be the act's primary purpose. See *J. I. Case Co. v. Borak, supra* at 431-32; cf. *Wyandotte Co. v. United States, supra.*

Propriety of Private Action.

In determining the propriety of affording plaintiff a cause of action for violation of § 610, we must ascertain whether such a remedy will effectuate the act and whether any "collateral" considerations counsel withholding this remedy. Since the purpose of the section is to prevent certain expenditures, allowing suit to enjoin or recover such expenditures would seem to be consistent with accomplishment of § 610's goal. Although the breadth of § 610's coverage favors enforcement solely by criminal sanction to avoid a multiplicity of possible suits challenging intangible public harm,[5] the intent to protect many people

5. This objection pertains to suits by non-stockholder citizens. Here, of course, plaintiff sues not only as a citizen and voter but also as a stockholder of the allegedly offending corporation, a narrower

from many possible violations also favors individual suits to enforce the act as the number of putative defendants, committing acts more likely to be covert than notorious, is so great that government enforcement alone might prove insufficient, cf. *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F. 2d 649, 651 (3d Cir. 1967). We note that stockholders, able to protect their investments by recovering damages on behalf of the corporation, may be expected to be particularly vigilant in detecting violation of § 610.

The nature of the prohibited conduct further supports provision of private remedies. Contributions or expenditures to influence federal elections are prohibited; yet the politician whose election is facilitated by violation of § 610 may be in charge of the statute's enforcement. This possible conflict of interest is not simply hypothetical; plaintiff alleges that in the instant case non-enforcement of § 610 by the Justice Department was due to the Department's control by the candidate defendants supported.[6]

The relative expeditiousness possible in civil, contrasted with criminal, proceedings, also supports implication of a cause here. The section's primary focus is on preventing the corruption of elections by corporate contributions. Violations of § 610 are, we presume, most likely

5. (Cont'd.)
class suffering tangible harm. We recognize also that the number of putative § 610 plaintiffs would be much smaller where, for instance, a Congressional rather than Presidential election is involved.

6. Among reasons cited by the district judge for concluding that plaintiff lacked a cause of action was his unwillingness to "assume the partisan enforcement of the Act as plaintiff suggests." 350 F. Supp. at 231. We make no such assumption here. While plaintiff has alleged, and presumably stands ready to prove, partisan enforcement of § 610, our finding of a cause of action is supported simply by the possibility of such enforcement, or non-enforcement—presence or absence of actual partisan enforcement in this case is irrelevant to our determination.

to occur in the period immediately preceding an election, and, given the delays incident to criminal investigation and grand jury indictment as well as trial, the election may well be over before the section's violation is determined. Private enforcement, particularly by injunction, can be relatively swift.

We note no countervailing reason for denying private remedies here. The matter before us involves none of the "special circumstances" discussed in *Borak* as counseling denial of a private cause of action. See *J. I. Case Co. v. Borak, supra* at 396-97. Nor does § 610 involve the operation of a regulatory agency whose policy determinations on this or other matters might be threatened by allowing private enforcement. See *Holloway v. Bristol-Meyers Corp., supra* at 990-92, 997-1002. Thus, we find allowance of a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief, proper to remedy violation of § 610.[7]

III.

The district court concluded, defendants contend rightly, that even if plaintiff were found to have a cause of action under § 610, defendants would be entitled to judgment as a matter of law. 350 F. Supp. at 231-32. The court decided that the meaning of "contribution or expenditure" in § 610 was governed by the definition of those terms in 18 U. S. C. § 591 (1970), as amended (Supp. II 1972); that § 591 requires a purpose to influence the nomination or election of a particular person; and that defendants' advertisements and pamphlets were designed not to influence election of any person but to advocate an honest campaign and "respond to an accusation leveled against the business community." *Id.* Plaintiff contests and defendants support each of these conclusions.

7. The propriety of awarding such relief must depend on the circumstances of each case. We note also that where a non-stockholder plaintiff sues, presumably only for injunctive relief, there may be a question as to the plaintiff's ability to satisfy the $10,000 jurisdictional amount for 28 U. S. C. § 1331 (1970).

Scope of § 610.

Plaintiff disagrees with judging Bethlehem's expenditures by the § 591 definition of that term, claiming that § 610 contains a more specific definition of the term, which should control here. Section 591, in relevant part, reads:

> When used in sections 597, 599, 600, 602, 608, 610 and 611 of this title—
>
> * * *
>
> (f) "expenditure" means—
>
> (1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . ., made for the purpose of influencing the nomination for election, or election, of any person to Federal office . . . .

Section 610, as pertinent, states that "[a]s used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment . . . to any candidate, campaign committee, or political party or organization . . . ." Corporate communication to stockholders and non-partisan "get-out-the-vote" drives aimed at stockholders and their families are explicitly excluded.

The definition given "expenditure" in both sections traces back to the Federal Election Campaign Act of 1971, P. L. 92-225, Title II, §§ 201, 205, 86 Stat. 3. The drafters clearly intended § 591's definition to affect interpretation of § 610, for they expressly provided that the definitions in § 591 applied to use of those terms in § 610. We note

also that § 591 indicates the "meaning" of expenditure while § 610 only indicates certain matters "included" in that term. We therefore read § 610 as supplementing rather than replacing § 591's definition. Nothing specifically included as an expenditure for § 610, however, covers Bethlehem's challenged actions. Thus, it appears that the district court was correct in concluding that Bethlehem's challenged expenditures are not proscribed unless they fall within § 591's definition of "expenditure."

An integral part of § 591's definition of prohibited expenditures is the requirement that they be for the purpose of influencing someone's election to federal office—in other words, § 591 requires a partisan purpose. Plaintiff argues, however, that § 610, by negative implication in its exclusion of only some non-partisan get-out-the-vote drives, makes unlawful other get-out-the-vote drives, even though non-partisan. Plaintiff supports his contention by reference to legislative history.

Several comments by key Congressmen in debate over the most recent amendment to § 610 indicate that the section now would prohibit a non-partisan get-out-the-vote drive if financed from a corporation's general treasury and aimed at the general public. See, e.g., 117 Cong. Rec. 43380-81 (remarks of Congressman Hansen), 43381 (remarks of Congressmen Hansen and Hays), 43387-88 (remarks of Congressmen Ashbrook, Hansen and Hays). The debates also indicate that members of Congress had a fairly specific and limited type of activity in mind when speaking of "get-out-the-vote" drives, primarily door-to-door canvassing and escorting people to the polls, see *id.* at 43386 (remarks of Congressman Crane), 43387 (remarks of Congressman Ashbrook), 43388 (remarks of Congressman Hays), and that the primary concerns with such drives were, first, that they were generally non-partisan

in name only, and, second, that their partisanship was not often apparent to observers, see *id.* at 43388 (remarks of Congressman Ashbrook), 43390 (remarks of Congressman Steiger).

Application of § 610.

The expenditures challenged here were for activities that would not seem to have the hallmarks of a "get-out-the-vote" drive—Bethlehem's communications were in writing and aimed at the entire public, rather than selected portions, so their partisanship, if any, could be readily determined. We would not, on the present record, find Bethlehem's expenditures for these communications, if non-partisan, to be proscribed by any prohibition on non-partisan get-out-the-vote drives that may be implicit in § 610. We turn to the inclusion or exclusion of these expenditures from the definition of that term in § 591.

The district court found that Bethlehem's expenditures were non-partisan and thus outside the sweep of § 591 and, hence, of § 610. This finding rests on the fact that no candidate or party was named in the corporation's ad and pamphlet. Unless § 591 requires that a candidate or party be named, the district court's grant of summary judgment cannot be upheld; the partisanship of Bethlehem's statements is a factual question as to which the parties are in dispute,[8] and on summary judgment we must accept as true plaintiff's allegation of partisanship. See *Johnson v. Alldredge*, 488 F. 2d 820, 823 (3d Cir. 1973).

Nothing in the language or legislative history supports an interpretation of sections 591 and 610 that would make lawful an expenditure simply because in the com-

8. The definition of expenditure in § 591 requires a partisan purpose; we assume here that where a communication is the expenditure's direct product, the partisan purpose must appear from the communications content, viewed in light of surrounding circumstances.

munication it paid for no candidate was named. There is no evidence Congress thought the American public so unperceptive that it would recognize a statement as supporting or attacking a particular candidate only by use of his name; such a requirement would eviscerate § 610. Since dispute exists as to a material factual issue, the district court erred in granting summary judgment and denying plaintiff's motion for an evidentiary hearing.

IV.

Defendants contend that § 610 is unconstitutional, urging a variety of grounds. Although defendants do not treat their various constitutional contentions separately, their underlying argument appears to be that, if applied to prohibit non-partisan political speech, § 610 would violate the First Amendment. Because we have decided that § 610 would proscribe Bethlehem's expenditures only if they financed partisan communications, we do not reach defendants' constitutional contentions. See *United States v. UAW, supra* at 591-92. We note that the district court has never passed on these contentions and that they may be reasserted on remand.

The judgment of the district court is reversed and the matter is remanded for further proceedings consistent with this opinion.

ALDISERT, *Circuit Judge*, dissenting.

Standing in this case does not trouble me. This is not a taxpayer's suit, *Flast v. Cohen*, 392 U. S. 83 (1968), *Frothingham v. Mellon*, 262 U. S. 447 (1923); nor a suit to obtain judicial review of agency action, *United States v. Students Challenging Regulatory Agency Procedures*, 412 U. S. 669 (1973), *Sierra Club v. Morton*, 405 U. S. 727 (1972), *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150 (1970); nor a voter's

complaint alleging impairment of his right to vote, *Baker v. Carr*, 369 U. S. 186 (1962). Only the damages aspect of the complaint has survived the mootness of the injunctive request. Thus, the claim is reduced to a garden variety case or controversy in which a plaintiff stockholder asserts economic harm to the corporation for which he has standing derivatively on behalf of the corporation. *Kauffman v. Dreyfus Fund, Inc.*, 434 F. 2d 727 (3d Cir. 1970), *cert.* denied, 401 U. S. 974 (1971).

I have heretofore expressed discomfort with certain decisions of this court regarding standing. *See, United States v. Richardson*, 465 F. 2d 844 (3d Cir. 1972), (Adams, J., dissenting, joined by Aldisert and Hunter, JJ.), and *Schiaffo v. Helstoski*, — F. 2d — (3d Cir., Nos. 72-2167/68, January 4, 1974) (Aldisert, J., dissenting.) And I would hope that the district courts and courts of appeals will soon receive definitive guidance in this "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations. . . ."[1] The Supreme Court has heard argument in two important standing cases, *United States v. Richardson, supra,* (No. 72-885, argued October 10, 1973), 42 U. S. L. W. 3216, and *Richardson v. Reservists Committee to Stop the War,* (No. 72-1188, argued January 14, 1974), 42 U. S. L. W. 3418.

The standing issue aside, I would affirm the district court because I find that Congress has not provided a civil remedy for the plaintiff expressly or by implication. While an implied right of action may be rationalized with considerable persuasion, this can be done only by defying the Supreme Court's recent pronouncement in *National Railroad Passenger Corp. v. National Association of Railroad*

1. *United States ex rel. Chapman v. Federal Power Commission*, 345 U. S. 153, 156 (1953).

Passengers, — U. S. —, (42 U. S. L. W. 4132, January 9, 1974) (Amtrak). I see Amtrak to be a definite signal to the courts of appeal and district courts to decelerate use of excerpts from Justice Clark's opinion in *J. I. Case Co. v. Borak,* 377 U. S. 426, 431-432 (1964), to find implied civil remedies not expressly authorized by Congress. Three bright warning lights were flashed in Amtrak:

> 1. "[T]he inference of . . . a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."
>
> 2. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States,* 278 U. S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.*"
>
> 3. "[T]he most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. *Neuberger v. Comm'r,* 311 U. S. 83, 88 (1940)."

42 U. S. L. W. at 4134.

I.

Amtrak's first principle, the imperative to ascertain legislative intention, requires that we examine the entire legislative package known as the Federal Election Campaign Act of 1971. This case is brought under Title II of

the Act, containing amendments to Title 18 of the United States Code, including 18 U. S. C. § 610. There is no express provision for a civil remedy, public or private, in Title II. By contrast, Title II of the Act authorizes the Attorney General on behalf of the United States to commence a civil action for violation of its subchapter. *See,* 2 U. S. C. § 438(d)(1)-(5). This public cause of action in Title III supplements the penal provision of that Title, 2 U. S. C. § 441. *See also,* 11 C. F. R. §§ 20.10 and 20.11. In *T. I. M. E., Inc. v. United States,* 359 U. S. 464 (1959), the Court refused to imply a private right of action in favor of shippers under the Motor Carrier Act of 1935, 49 U. S. C. § 316(b) and (d) (Interstate Commerce Act, Part II), for overcharges by certified carriers. The government, as a shipper, brought suit against the carrier contending that this language imposed a statutory duty on motor carriers not to charge or collect other than "reasonable" rates and urged that a cause of action be implied. The Supreme Court refused to imply a cause of action. Noting that the provisions of Part I and III of the Interstate Commerce Act, relating to rail and water carriers, granted a private remedy to shippers, the Court emphasized that similar provisions were conspicuously absent in Part II relating to motor carriers. The Court said that creation of a remedy under these circumstances "would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I." 359 U. S. at 471. I would apply the *ratio decidendi* of *T. I. M. E., Inc.,* to these proceedings.

Further, Congress recently has had occasion to reexamine § 610. In the course of amending this section and enacting the Federal Election Campaign Act of 1971, Congress did not provide a private remedy to supplement the express criminal sanctions.

I detect no language in this Act manifesting Congressional intent to create a private right of action by implication similar to *J. I. Case Co. v. Borak, supra,* and *Texas & Pacific Railway Co. v. Rigsby,* 241 U. S. 33 (1916). I therefore would accept the cogent reasoning of the Tenth Circuit in *Chavez v. Freshpict Foods, Inc.*, 456 F. 2d 890, 895 (10th Cir.), *cert. denied,* 409 U. S. 1042 (1972):

> We recognize that the tripartite classification of governmental powers—legislative, executive and judicial —has no absolutes, and that governmental functions are not easily defined as "legislative", "executive" or "judicial". But in the cases at bar the substantive rights relied upon by the appellants have been promulgated by Congress in the exercise of its power to enact penal statutes. In effect, appellants urge this court, under its classical adjudicative power, to legislate. When Congress was dealing with the subject matter of the statutes here involved, it was capable of clearly and directly providing the rights and remedies urged by the appellants.

II.

I am persuaded that this is a classic case for the application of Amtrak's second principle which teaches: "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." A legislative schema expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar "principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*"

III.

Amtrak's third principle, that statutory construction must yield to clear cortrary legislative intent, renews the

previous emphasis on Congressional intent. But appellant conceded at oral argument that the Congressional history is devoid of any reference to a private civil remedy. Therefore, we lack any semblance of contrary legislative intent, let alone clear contrary legislative intent.

It seems to me, therefore, that a discussion of the necessity for destroying the influence over elections which corporations exercise through financial contributions and the recognition that corporate officials have no right to use corporate funds improperly, *United States v. C. I. O.,* 335 U. S. 106, 113 (1948), is simply irrelevant to the narrow issue posed by this appeal: whether it can be properly concluded that a private civil right of action may be implied to supplement the penal provisions of Title II. Our polestar is Congressional intention. To imply such a right is to presume that Congress intended to provide for such an action, but overlooked its inclusion when the Federal Corrupt Practices Act was originally enacted, and that Congress overlooked it again when it enacted the comprehensive Federal Election Campaign Act of 1971. I cannot impute such derelictions to a Congress vitally concerned in a matter so universally discussed and the subject of manifest, if not all-consuming, public interest.

The Supreme Court's entreaty for restraint in Amtrak is justified. Otherwise a reasoned case for an implied private right of action could be constructed within the framework of every federal criminal statute simply by showing that plaintiff is "within the class Congress sought to protect by prohibiting" certain conduct. Three comprehensive criminal codes have been introduced in the 93rd Congress: S. 1., "Criminal Justice Codification, Revision and Reform Act of 1973," described by its proponents, Senators McClellan, Ervin, and Hruska, as the lengthiest bill ever introduced in the Senate, exceeding the Internal Code of 1954;

H. R. 6046; S. 1400, "Criminal Code Reform Act of 1973"; and H. R. 10047, reflecting the recommendations of the National Commission on Reform of Federal Criminal Laws, styled "Federal Criminal Code Reform Act of 1973." Every criminal statute is designed to protect some individual, public, or social interest. The criminal statutes define offenses involving danger to the person, against property, against public order, health, safety and sensibilities, as well as offenses against national security, foreign relations, immigration and nationalization, integrity and effectiveness of government operations, internal revenue and customs, civil rights and elections. Is it to be inferred that Congress is also considering an unwritten, but *intended,* comprehensive civil code at the same time? I don't think so.

If the "ambit of protection" test were to be applied to every criminal statute by the court, then it would follow that, given particular circumstances, a remedy could be fashioned to afford civil relief upon the breach of every criminal statute. And thus the federal judiciary, and not the Congress, would be defining the metes and bounds of federal court jurisdiction. But there is no authority for this, because it is the Congress, and not the federal judiciary, which creates subject matter jurisdiction for the federal courts. *See, Sheldon v. Sill,* 8 How. 440, 12 L. Ed. 1147 (1850); *Ex Parte McArdle,* 7 Wall. 506, 19 L. Ed. 264 (1869).

I am persuaded that the Amtrak court could not fail to notice the plethora of implied civil remedy cases which arose from an unrestricted application of *J. I. Case Co. v. Borak, supra,* and an overgenerous use of Justice Black's overgenerous quotation in *Bell v. Hood,* 327 U. S. 678, 684 (1946), that "federal courts may use any available remedy to make good the wrong done." I am convinced that the

Amtrak court consciously and deliberately applied the brakes and meant exactly what it said when it declared that a "private cause of action not otherwise authorized by statute" may not be implied in the absence of clear "evidence of legislative intent."

Although I recognize that the Presidential election of 1972 is a matter of dominant national, sociological and political interest in 1974, an imperative of a detached decisional process commands that neutral principles of construction be employed in all our cases because of the precedential or institutional effect of our determinations. To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code. And to do this is to suggest that for every written volume of Title 18 of the United States Code there is an unwritten volume of Title 28.

Because I cannot begin to accept this notion, I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1739.

Re: RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104

ON BEHALF OF HIMSELF
AND ON BEHALF OF

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS,

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION

and

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,

Nominal Defendant

RICHARD A. ASH, *Appellant,*

(D. C. Civil No. 72-1925)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: SEITZ, *Chief Judge* and HASTIE and ALDISERT, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed July 11, 1973, be, and the same is hereby reversed and the matter is remanded for further proceedings consistent with this opinion. Costs taxed against appellees.

ATTEST:

/s/ THOMAS F. QUINN,
Clerk.

April 16, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1739.

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION,

v.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, ET AL.,

Appellees,

and

BETHLEHEM STEEL CORPORATION,

Nominal Defendant,

RICHARD A. ASH,

Appellant.

ORDER SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by APPELLEES in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked

for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ COLLINS J. SEITZ,
Judge.

Dated: May 15, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1739.

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION,

v.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS AND GEORGE P. JENKINS, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION,

Appellees,

and

BETHLEHEM STEEL CORPORATION,
Nominal Defendant,

RICHARD A. ASH,
Appellant.

MOTION OF APPELLEES FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI.

Appellees, by their undersigned attorneys, move the Court, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, for a stay of the mandate in the above appeal, and allege as follows:

1. On April 16, 1974, this Court—Chief Judge Seitz and Circuit Judges Hastie and Aldisert—reversed the Order of the United States District Court for the Eastern District of Pennsylvania (District Judge E. Mac Troutman) granting summary judgment in favor of defendants in this stockholders' action against the Directors of Bethlehem Steel Corporation ("Bethlehem"). Judge Aldisert dissented from the Opinion of the Court on the ground, *inter alia,* that the Majority Opinion was contrary to the recent decision of the Supreme Court of the United States in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* — U. S. —, 42 U. S. L. W. 4132 (Opinion filed January 9, 1974). See Slip Opinion at pp. 17-22.

2. On April 30, 1974 appellees filed a timely "Petition For Rehearing and Suggestion of Rehearing En Banc."

3. Appellees' "Petition For Rehearing and Suggestion of Rehearing En Banc" was denied by Order of this Court dated May 15, 1974.

4. Appellees intend to apply to the Supreme Court of the United States for a writ of certiorari for review of this case.

5. Rule 41(b) of the Federal Rules of Appellate Procedure provides that "[a] stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties." Rule 41(b) further provides that "[t]he stay shall not exceed 30 days unless the period is extended for cause shown" and that "[i]f during the period of the stay there is filed with the clerk of the court of appeals a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court."

WHEREFORE, appellees respectfully move this Court:

(a) to enter an order staying issuance of the mandate for a period of 30 days, and

(b) to order therein that if, within the period of the stay, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court that appellees have filed a petition for a writ of certiorari in that Court, the stay thus granted by this Court shall continue until final disposition by the Supreme Court.

/s/ EDWIN P. ROME,
Edwin P. Rome,
JEROME R. RICHTER,
WILLIAM H. ROBERTS,

Of Counsel:
CURTIS H. BARNETTE
Martin Tower 2007
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Dated: May 17, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH, ETC.,

v.

STEWART S. CORT., ET AL.

RICHARD A. ASH,
Appellant.

ORDER.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 21, 1974.

/s/ COLLINS J. SEITZ,
Collins J. Seitz,
Chief Judge.

Dated: May 22, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH, ETC., ET AL.

v.

STEWART S. CORT, ETC., ET AL.

RICHARD A. ASH,
Appellant.

(D. C. Civil Action No. 72-1925)

ORDER.

It is ORDERED that the record/~~exhibits~~ in the above-entitled case be and hereby is transmitted to the Clerk of the Supreme Court of the United States.

For THE COURT,

/s/ THOMAS F. QUINN,
Clerk.

Date: July 10, 1974

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 11, 1974

Edwin P. Rome, Esq.
Blank, Rome, Klaus & Comisky
Four Penn Center Plaza
Philadelphia, Pa. 19103

RE: CORT v. ASH
No. 73-1908

Dear Mr. Rome:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Encls.

Supreme Court, U. S.
FILED
OCT 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,

Petitioners,

v.

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD A. ASH,
1612 Latimer Street,
Philadelphia, Pennsylvania. 19103
Respondent, Pro Se.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-9711

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS AND GEORGE P. JENKINS, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION,

AND

BETHLEHEM STEEL CORPORATION,
Petitioners,

v.

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

I. Did the Court of Appeals correctly determine that there was an implied cause of action in favor of a corporate shareholder where corporate funds were spent in violation of 18 U. S. C. § 610, in light of the legislative history of that provision and its self-evident purpose to protect minority shareholders from having corporate funds spent for political purposes?

II. Was the Court of Appeals correct in remanding the case to the District Court for trial on the question of whether the expenditures in question were for a "partisan purpose" rather than ruling upon the First Amendment claims of petitioners?

COUNTER-STATEMENT OF THE CASE.

The United States District Court for the Eastern District of Pennsylvania granted defendants' motion for summary judgment on July 12, 1973. The District Court, without opinion, held that plaintiff lacked an implied right to prosecute a cause of action under 18 U. S. C. § 610. At the time summary judgment was entered, the record consisted of a complaint, an answer and a minimal stipulation of agreed upon facts. Plaintiff had had no discovery and the key factual allegations of the complaint were virtually undeveloped. These allegations were as follows:

> "13. At some time in 1971 or 1972, defendants entered into a plan involving the utilization of Bethlehem Steel's resources, including the expenditure of its funds, in connection with the 1972 United States presidential election.
>
> "14. The ultimate purpose of said plan was to influence the United States electorate to help bring about a Republican Party victory in said election. This purpose was solely in furtherance of the individual interests and beliefs of defendants and was in violation of state and federal law, and in derogation of the rights of the United States public, and of the approximate one half of the shareholders of Bethlehem Steel that are registered members of the Democratic political party.
>
> "15. Thereafter, in furtherance of said plan and purpose, defendant caused corporate resources to be utilized, including the expenditure of substantial funds in connection with said political campaign, including, *inter alia*, their causing to be prepared and disseminated at corporate expense, an advertisement entitled 'I Say Let's Keep the Campaign Honest. Mobilize "Truth Squads" . . .', attributed to defendant Cort."

In substance, the action of the District Court amounted to dismissal of the complaint for failure to state a cause of action cognizable in federal court.

On April 16, 1974, the United States Court of Appeals for the Third Circuit reversed the action of the District Court and remanded the case for further proceedings, consistent with its Opinion. The Third Circuit held that allowance of a private cause of action under 18 U. S. C. § 610 is proper [A18] [1] and found that there exists dispute as to a material factual issue [A22]. The Third Circuit observed that plaintiff had alleged that Bethlehem Steel Corporation had made partisan expenditures and that "on summary judgment we must accept as true plaintiff's allegation of partisanship." [A22].

Defendants now ask this Court to intervene as the case is being remanded to the trial court for development of a factual record.

1. Page citations refer to the Appendix to the Petition for a Writ of Certiorari, filed June 20, 1974.

ARGUMENT.

I. The Court of Appeals Correctly Held That There Is an Implied Cause of Action in Favor of Shareholders of a Corporation Whose Funds Have Been Unlawfully Expended in Violation of 18 U. S. C. § 610.

Petitioners seek to bring before this Court for review the decision of the Court of Appeals upholding the basic theory of the plaintiff that a violation of 18 U. S. C. § 610 creates an implied cause of action for damages in favor of one of the classes of persons it was intended to protect —corporate shareholders. There has been no discovery, let alone a trial, and hence the only issue before the Third Circuit was whether plaintiff stated a cause of action which he was entitled to attempt to prove in a trial in the District Court.

The Court of Appeals held that plaintiff had an implied civil cause of action for a violation of the criminal provisions of 18 U. S. C. § 610, which prohibits expenditures in connection with federal election campaigns by corporations and unions. In doing so, it followed the well-established rule that implied causes of actions for violations of criminal statutes will be held to exist where to do so would advance the purposes of the criminal provision. See *Wyandotte Transportation Co. v. United States*, 389 U. S. 191, 202 (1967); *J. I. Case v. Borak*, 377 U. S. 426 (1964); *Texas and Pacific Ry. Co. v. Rigsby*, 241 U. S. 33 (1916); *Reitmeister v. Reitmeister*, 162 F. 2d 691 (2d Cir. 1941); and *Fitzgerald v. Pan Amercian World Airways*, 229 F. 2d 499 (2d Cir. 1956). Petitioners do not quarrel with this general rule, but instead allege that based upon this Court's decision last term in *National Railroad Passengers Corp. v. National Association of Railroad Passengers*, 414 U. S. 453

(1974), the allowance of a private cause of action for civil damages was improper in this case. In plaintiff's view, the Court of Appeals correctly distinguished the *Amtrak* decision and held the private civil cause of action proper in this case.

In *Amtrak*, the plaintiffs sought to derive a cause of action from section 307(a) of the National Railroad Passenger Act of 1970, 45 U. S. C. §§ 501 et seq., in an action which sought to enjoin the announced discontinuance by Amtrak of certain passenger services. Plaintiff claimed that, as an association of railroad passenger users, it was one of the groups intended to be protected by the Act, and that since the statute prohibits the proposed discontinuations, the plaintiff had a right to seek a court order preventing them from going ahead. However, the very same section relied upon by plaintiff in *Amtrak* to provide it a cause of action, also contained specific authority authorizing the Attorney General of the United States to obtain similar relief for violations of that statute. In addition, section 307(a) also contained a provision authorizing, in certain very limited circumstances, affected employees, or their legal representatives, to seek court orders to stop allegedly unlawful discontinuation of passenger service. From these two provisions the Court concluded that Congress had considered the matter and had decided that there were only two persons who could bring an enforcement action—the Attorney General or in certain cases affected employees—and that it had explicitly excluded other potentially affected persons such as railroad passengers.

This Court's construction of section 307(a) was confirmed by its reading of the legislative history. It found that a proposal to amend that provision to allow a broader class of persons to bring suit for violations of a statute had been advanced and rejected by the Committee with jurisdiction over the matter, based largely upon the opposition of the Secretary of Transportation who was the official that would be responsible for the implementation of the Act. 414 U. S. at 459-460. Furthermore, this Court found that the discontinuance of uneconomic routes was part of a program necessary to save any passenger service in the United States, and that Congress intended Amtrak to be able to eliminate such service without going to the Interstate Commerce Commission or the various state regulatory commissions as had been required under prior law. Based upon this legislative history, the Court concluded that to allow private rights of action would substantially frustrate the purpose and would produce a "myriad" of lawsuits which could result in huge losses to Amtrak while litigation was pending. The result, the Court concluded, would be less efficiency rather than more efficiency as the Act intended. Based upon its finding that there was extensive scrutiny by Congress and the Executive, it concluded that it was rational for Congress to suppose that the Attorney General and, in limited instances, affected employees, should be the only ones who could object to proposed discontinuance. 414 U. S. at 464.

In plaintiff's view, the majority below correctly distinguished *Amtrak* and found its reasoning to be inapplicable to the facts of this case. *Amtrak* does not purport to repeal the general rule of *Wyandotte, Case* and the other authorities relied on by the Third Circuit. This case involves an alleged violation of a criminal statute, whereas in *Amtrak* the alleged implication was from a civil statute in which there were specific remedies for specific persons set forth in the very provision relied upon by the plaintiff there. The only remotely comparable aspect of the statute here is the recently enacted provision of Title III, 2 U. S. C. § 438(d)(1)-(5), which authorizes specific actions by the

Attorney General to restrain violations of the campaign reporting provisions of the federal election laws. That provision is specifically limited to that Title, whereas the cause of action involved here is in section 610 in Title 18, not in any portion of Title III of the Election Act of 1971. Furthermore, Section 438 deals with an entirely different kind of violation—reporting requirements—rather than illegal corporate contributions at issue here. There is simply no basis for concluding that a specific remedy with regard to one provision had any bearing whatsoever on the pre-existing rights and liabilities under another provision.[2]

Equally important is the fact that even if section 438 of Title III can be seen as a prohibition against injunctive actions, it would not stand in the way of a damage claim, which is involved here, since no person is assigned the function of collecting damages sustained by a corporation whose officers have violated section 610. This was not the case in *Amtrak*, where both the Attorney General and the party would be seeking similar relief in any action would be brought. The remedy of a criminal sanction will in no way aid the injured stockholders, and, in fact, a fine levied against the corporation will only compound the damages suffered by the shareholders at the instance of the wrongdoing officers.

As this Court has made clear in *Wyandotte Transportation Co. v. United States, supra*, the implication of a civil

2. At the time that the amendments in 1971 were made adding the specific civil relief provisions in Section 438, the only authority dealing with implied causes of action under the various criminal provisions relating to the federal election law was the decision in *Common Cause v. Democratic National Committee*, 333 F. Supp. 803 (D. C. 1971), which upheld private rights of action for violations of sections 608 and 609 of Title 18. Thus, it is at least arguable that Congress explicitly approved the holding in the *Common Cause* case, and surely there is nothing to suggest that it would have considered the matter differently with respect to implied causes of action for violation of section 610 of Title 18.

cause of action must be consistent with the purposes of the statute and be in favor of a class of persons intended to be protected. Construing section 610, this Court in *United States v. CIO*, 335 U. S. 106, 113 (1948), concluded that in enacting the ban on corporate contributions Congress was in part motivated by "the feeling that corporate officials had no moral right to use corporate funds for contributions to political parties without the consent of stockholders." This comment is borne out by the legislative history of the predecessor of Section 610, the Act of January 26, 1907, 34 Stat. 864. In calling for that legislation, President Theodore Roosevelt stated that "all contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes." 40 Cong. Rec. 96. These purposes were emphasized in debates on the floors of both Houses in 1971 relating to the amendments to section 610, which amendments are not relevant to this case. See Remarks of Senator Goldwater, 117 Cong. Rec. 29330, and Remarks of Representative Hansen, 117 Cong. Rec. 43380-81.

We submit that the clear legislative history and self-evident purpose of section 610 indicate that stockholders are among the class intended to be protected, and the Court of Appeals was correct in so holding. In doing so, it followed the long-established rule of implying civil causes of action for violations of criminal statutes. There is no conflict with any decision of this Court or that of any Court of Appeals. Presumably, there will not be a "myriad" of actions as was suggested in *Amtrak* because presumably public corporations do not violate the federal election laws in anywhere near the number of instances that would impose a burden on this Court. In short, the Court of Appeals' decision is entirely correct, and there is no basis for review by this Court of it.

II. There Is No Basis for This Court to Review the Construction Given by the Court of Appeals of Section 610 or to Consider the Constitutionality of Its Application in This Case Since the Matter Has Simply Been Remanded for Further Proceedings.

Petitioners also ask this Court to review what they claim to be an erroneous interpretation of section 610 which they allege to be in conflict with decisions of this Court and those of other circuits, as well as to review the claim that the application of section 610 to this case is violative of the First Amendment. This request of petitioners should be denied both because it represents a misreading of what the Court of Appeals said and did, and because in any event the proceedings are at a premature stage, with an incomplete record, which does not adequately present the questions for review by this Court.

As petitioners correctly point out, a series of cases in this Court and the Courts of Appeal have required that for an expenditure to constitute a violation of section 610, it must be used for "active electioneering" and not merely be used to discuss a particular issue. While the Third Circuit did not use the phrase "active electioneering," it specifically found that the expenditure to constitute a violation of section 610 must be for "a partisan purpose". It is apparent from the context of the discussion of the meaning of "expenditure" that the Court was aware of the parameters of that term and that it intended no deviation from any of prior cases.

The holding of the Court of Appeals was that in order for an expenditure to meet the test of being for a partisan purpose, the advertisement paid for need not specifically name the candidate. However, where the candidate is not named, it is a question of fact as to whether there was a partisan purpose connected with the advertisement, a question which can be resolved only after a trial based upon

all of the circumstances. This comports with common sense, for, if the advertisement in question had not referred to a "political candidate" who had alleged that big business was not paying its fair share of taxes, but instead suggested that it was a "radical from South Dakota" who made that claim, there can be little doubt that that would have been active electioneering against Senator McGovern, just as much as a reference praising "the current occupant of the White House" would have been active electioneering, for a partisan purpose, in favor of President Richard Nixon. The ruling by the Court of Appeals is wholly consistent with all of the other decisions construing the meaning of expenditure under section 610, and there is no basis for review by this Court of that holding.

As to the applicability of the First Amendment to prohibitions on corporations spending stockholders' money to advance the cause of candidates whom the stockholders may not approve, we do not believe that there are any serious First Amendment questions regarding that issue. While there may be First Amendment questions lurking on the penumbras of section 610, this case is not in a proper posture, nor is there any need for this Court to anticipate such questions at this time. This is, after all, a civil damage proceeding, and there is more than adequate opportunity for review by this Court at some future date should the defendants be held liable for damages in the District Court and that holding be sustained on appeal. The Court ought not to reach the constitutional issues on a barren record such as exists now.

In a closely similar situation to that at bar, *United States v. Auto Workers*, 352 U. S. 567 (1957), the Supreme Court considered the propriety of a criminal indictment brought under Title 18 Section 610, which alleged that the appellees had used union dues to sponsor commercial tele-

vision broadcasts designed to influence the electorate to elect certain candidates for Congress in connection with the 1954 election. The appellee raised in defense the argument that the statute as applied was violative of First Amendment rights to the United States Constitution.

The Court, in upholding the indictment, remanded the case for trial, refusing to decide whether the statute as applied to the activities in question was unconstitutional without the benefit of a full trial record. The Court stated on this point:

> ". . . only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative processes especially demanded for constitutional decision." *U. S. v. Auto Workers, supra,* at 591.

CONCLUSION.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Philadelphia, Pennsylvania. 19103
Respondent, Pro Se.

Supreme Court, U. S.
FILED
DEC 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,
Petitioners,

v.

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. PROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS AND GEORGE P. JENKINS, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION,

AND

BETHLEHEM STEEL CORPORATION,

Petitioners,

v.

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania granted summary judgment for Peti-

tioners on July 11, 1973, without opinion. The Order of the District Court granting summary judgment is set forth in the Appendix [A87].

The majority opinion of the panel of the Court of Appeals for the Third Circuit reversing the Order of the District Court, and the dissenting opinion of Judge Aldisert, both dated April 16, 1974, are reported at 496 F. 2d 416 [A92]. The Court of Appeals denied a Petition for Rehearing and Suggestion of Rehearing En Banc, without opinion. The Order denying the Petition for Rehearing is set forth in the Appendix [A118].

Prior opinions of the District Court and of the Court of Appeals in connection with the denial of plaintiff's application for a preliminary injunction are reported at 350 F. Supp. 227 and 471 F. 2d 811, and are printed in the Appendix [A46 and A60].

JURISDICTION.

The Court of Appeals for the Third Circuit entered judgment reversing the District Court on April 16, 1974 [A116]. A timely Petition for Rehearing containing a suggestion for rehearing *en banc* was filed by the Petitioners on April 30, 1974, and was denied by Order of the Court of Appeals *en banc* dated and entered May 15, 1974 [A118]. On May 17, 1974, Petitioners filed a Motion for Stay of Mandate pending application to this Court for a Writ of Certiorari, which the Court of Appeals granted by Order dated May 22, 1974, thereby staying its mandate until June 21, 1974 [A123].

The Petition for a Writ of Certiorari was filed on June 20, 1974, and was granted on November 11, 1974 [A125].

The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Title 18 U. S. C. § 610, a criminal provision recently reenacted and amended in Title II of the Federal Election Campaign Act of 1971 ("FECA"), prohibits corporations and labor unions from making contributions and expenditures "in connection with" any federal election, and provides that an officer or director of any corporation, or officer of any labor organization, who consents to any such contribution or expenditure is punishable by a fine of $1,000 or imprisonment for one year, or both.

The constitutionality of this provision has twice been questioned by this Court, in *United States v. C. I. O.*, 335 U. S. 106 (1948), where four Justices concurred in the unanimous dismissal of an indictment under § 610, on the ground that § 610 is unconstitutional, and in *United States v. International Union United Auto Workers*, 352 U. S. 567 (1957), where three dissenting Justices expressed the view that this Court should reach the constitutional questions presented and declare § 610 unconstitutional, describing § 610 as "a broadside assault on the freedom of political expression guaranteed by the First Amendment", 352 U. S. at 598 (dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black and Mr. Chief Justice Warren). The constitutionality of § 610 was expressly pretermitted in *Pipefitters v. United States*, 407 U. S. 385, 400 (1972)

The questions presented are these:

1. Did the Court of Appeals err in "implying" from 18 U. S. C. § 610 a private right of action, not otherwise authorized by statute, on behalf of a stockholder and registered voter against the directors of a corporation for a corporate expenditure for advertising allegedly in violation of § 610,

(i) in spite of the grave doubt concerning the constitutionality of § 610, which the Court of Appeals expressly refused to resolve, while at the same time "implying" a private right of action from the statute,

(ii) in the absence of any manifestation in the language of § 610 itself of any Congressional intent to authorize such a private right of action,

(iii) in the conceded absence of any legislative history evidencing Congressional intent to permit such a private right of action,

(iv) in the absence of any jurisdictional provision, such as that relied upon in *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964), conferring federal jurisdiction over the subject matter, and

(v) in view of the clear inference of *contrary* Congressional intent *not* to provide such a private remedy, to be drawn from Congress' provision of a private remedy in Title III of the Federal Election Campaign Act of 1971 and the conspicuous absence of such a remedy from Title II of the Act, which contains § 610?

2. Is the decision of the Court of Appeals, "implying" a supplemental, private right of action from the criminal provisions of 18 U. S. C. § 610, consistent with standards articulated in *National Railroad Passengers Corp. v. National Association of Railroad Passengers*, 414 U. S. 453 (1974) and *T. I. M. E., Inc. v. United States*, 359 U. S. 464 (1959)?

3. In view of the doubtful constitutionality of 18 U. S. C. § 610, did the Court of Appeals depart from settled principles of statutory construction by *expanding* the coverage of the statute to subsume additional remedies not authorized by Congress, instead of *restricting* the scope of remedies for its violation to those expressly provided, and thereby avoiding the question of its constitutionality?

4. May a private right of action, not otherwise authorized by statute be "implied" from 18 U. S. C. § 610 on behalf of a stockholder and registered voter against the directors of a corporation for an alleged violation of § 610?

5. In view of the doubtful constitutionality of 18 U. S. C. § 610 and the rule of construction that where language of an act will bear two interpretations equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred, did the Court of Appeals err in construing the term "expenditure", as used in 18 U. S. C. § 610, in such a way as to include within the statutory prohibition an expenditure for advertising, which is not in the nature of active electioneering and only incidentally expresses a view upon important public issues, and does not so much as mention the name of any political party or the name of any candidate for election to federal office?

6. On its face and as construed and applied by the Court of Appeals, is 18 U. S. C. § 610 violative of the freedoms of speech, press, petition and association, guaranteed by the First Amendment of the Constitution of the United States?

7. On its face and as construed and applied by the Court of Appeals, does § 610's prohibition, directed only against contributions and expenditures by labor unions and corporations, deprive labor unions and corporations of the equal protection of the laws, guaranteed by the Fifth Amendment of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the First and Fifth Amendments of the Constitution of the United States.

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The case involves 18 U. S. C. § 610, as amended by Sections 201 and 205 of the Federal Election Campaign Act of 1971, P. L. 92-225, 86 Stat. 3, which are set forth in Appendix A to this Brief.

STATEMENT OF THE CASE.

1. The Background.

An advertisement (the "Advertisement") entitled "I say, let's keep the campaign honest. Mobilize 'truth squads' . . ." appeared from on or about August 22, 1972, until September 7, 1972, in various magazines and in nineteen local newspapers in towns in which Bethlehem Steel Corporation ("Bethlehem") has plants. In connection with the September 11, 1972, mailing of a quarterly dividend to its stockholders, Bethlehem sent its stockholders a reprint of the Advertisement.

The Advertisement was based on a speech (the "Speech") given by Stewart S. Cort, Chairman of Bethlehem. As indicated in the Advertisement, the Public Affairs Department of Bethlehem sent to readers, on request, copies of the Speech and copies of a folder (the "Folder") entitled "How you can help to keep the campaign honest".

The Advertisement, the Speech and the Folder[1] encourage readers to become concerned and informed citizens, by reading books, magazines, newspapers and reports, by identifying the major issues of the day, by watching televised news programs, by listening to the views of political candidates, and by discussing current affairs and issues with friends, neighbors and business associates. Typical of the statements contained in these publications is the following excerpt from the Advertisement:

> "Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize 'truth squads,' perhaps.
>
> "One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.
>
> "And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

1. Reproduced as Appendices B, C and D hereto, respectively.

The Advertisement incidentally refutes the accusation of an unnamed "political candidate" that "big business" does not pay its fair share of taxes, by quoting the following statement of Stewart S. Cort, Chairman of Bethlehem:

> "My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.
>
> "So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

Neither the Advertisement nor the Speech nor the Folder mentions the name of any political party or of any candidate for election to any federal office.

2. The Complaint.

This stockholder's action was filed against Bethlehem and its directors in the United States District Court for the Eastern District of Pennsylvania on September 28, 1972, on the eve of the 1972 Presidential election, by Richard A. Ash, Esquire ("Ash"), the owner of 50 shares of common stock of Bethlehem. The original complaint [A8], to which is attached a copy of the Advertisement, alleged that the directors of Bethlehem had authorized an expenditure for the Advertisement and charged that such expenditure was in violation of 18 U. S. C. § 610, as amended by the FECA, P. L. 92-225, 86 Stat. 3. Count II of the original complaint charged that the expenditure was *ultra vires* and illegal under Delaware law. The complaint sought injunctive relief, including an Order that defendants place "corrective advertising at their own expense in national media", and compensatory and punitive damages in favor of Bethlehem, together with costs. In the complaint, Ash also sought an award of attorney's fees. Federal jurisdiction in the District Court was invoked pursuant to 28 U. S. C. § 1331.

3. Application for Injunctive Relief in the District Court.

The District Court denied Ash's application for a temporary restraining order on October 13, 1972 [A19]. Plaintiff's motion for a preliminary injunction was denied on October 25, 1972, after a hearing at which the parties entered into a stipulation (the "Stipulation") of uncontested facts in lieu of testimony. 350 F. Supp. 227 (E. D. Pa. 1972) [A46]. Mindful of the cardinal rule of construction that where a statute is susceptible of two constructions, one raising serious constitutional questions, and the other avoiding them, the Court's duty is to adopt the latter construction, Judge Troutman found that (350 F. Supp. at 232):

> "Plaintiff has failed to prove that there is a likelihood of success on the merits, in that:

> "(a) plaintiff had no private right of action under 18 U. S. C. § 610;
>
> "(b) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder are not 'contributions or expenditures' within the meaning of 18 U. S. C. § 610;
>
> "(c) the expenditures made by Bethlehem Steel in connection with the advertisement, the speech and the folder are not 'expenditures' made for 'the purpose of influencing the nomination for election, or the election of any person to Federal office' and hence, are not 'expenditures' within the meaning of 18 U. S. C. § 591 (f)(1);
>
> "(d) *the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder did not constitute 'active electioneering directed at the general public on behalf of a candidate in a Federal election' as defined in the legislative history to the recent amendment of 18 U. S. C. § 610;* Congressional Record, November 30, 1971, H 11477, 11478;
>
> "(e) to enjoin the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder would prevent a corporation from seeking an honest campaign and election and refuting a statement made by an unidentified candidate, which is adverse to its interest, thereby giving rise to grave First Amendment issues;
>
> "(f) *under the facts and circumstances of this case, 18 U. S. C. § 610 must be narrowly construed to avoid an overbroad application infringing on a corporation's (and labor union's) First Amendment right to seek an honest campaign and to refute statements on issues of*

crucial concern to it and to the public, thus preventing a public debate on such issues.''

4. Appeal of District Court's Denial of Injunctive Relief.

Ash appealed this ruling to the Court of Appeals for the Third Circuit which, after oral argument, affirmed, per curiam, the order of the District Court denying his motion for a preliminary injunction. *Ash v. Cort,* 471 F. 2d 811 (3d Cir. 1973) [A60]. Ash's Petition for Rehearing was denied by the Court of Appeals on January 31, 1973.

5. The District Court's Grant of Summary Judgment for Petitioners.

Petitioners moved in the District Court to require the posting of a bond for security for expenses, and on March 7, 1973, the District Court entered an Order [A68] granting the motion for security for expenses with regard to the cause of action under Delaware law, alone, directing Ash to post a bond in the amount of $35,000 as security for expenses. At the same time, however, the District Court granted Ash leave to amend the complaint by eliminating the claim under Delaware law set forth in Count II of the complaint, which Ash did on March 19, 1973.

Petitioners thereafter moved for summary judgment on the federal claim in Count I based on 18 U. S. C. § 610, on the grounds (1) that a stockholder has no private right of action for alleged violations of § 610, (2) that § 610 is inapplicable as a matter of law and (3) that § 610 is unconstitutional [A79].

On July 11, 1973, the District Court entered an Order granting Petitioners' motion for summary judgment [A87].

Ash appealed from the District Court's Order of July 11, 1973, granting Petitioners' motion for summary judgment.

6. Appeal of Judgment for Petitioners.

A divided panel of the Court of Appeals for the Third Circuit on April 16, 1974, reversed the judgment of the District Court. Over a dissent filed by Judge Aldisert, the Court below held, in an opinion expressing the views of two Judges of the panel, that a registered voter or a stockholder has an ''implied'' private right of action under § 610, although Congress did not see fit expressly to provide one.

Notwithstanding that four Justices of this Court, concurring in the unanimous affirmance of dismissal of an indictment under § 610 in *United States v. C. I. O., supra,* expressed the considered view that this provision *''cannot be squared with the First Amendment,''* 335 U. S. at 155, and in spite of the view of three members of this Court in *United States v. International Union United Auto Workers, supra* (where resolution of the constitutional questions was postponed), that this statute is a *''broadside assault on the freedom of political expression guaranteed by the First Amendment,''* 352 U. S. at 598, and contrary to decisions of every other circuit which has faced the issue, the majority below adopted the most sweeping, expansive construction conceivable of the term ''expenditure'', as used in § 610, holding that an expenditure by a corporation or a labor union for advertising which does not mention the name of any political party or the name of any candidate for election to federal office may nevertheless fall within the wide dragnet of § 610 [A104-108].

While ''implying'' from § 610 a private right of action, the majority at the same time *declined* to resolve the constitutional issues presented [A108].

On the basis of its construction of § 610, the majority held that remand would be necessary to resolve material issues of fact[2] [A108].

2. The issues of "standing" and "mootness" were also raised and discussed in the majority opinion, *sua sponte* [A94-97]. Al-

In the dissenting opinion, Judge Aldisert stated that the holding of the majority, "implying" a private right of action from § 610, could be arrived at in this case "only by defying the Supreme Court's recent decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* — U. S. — (42 U. S. L. W. 4132, January 9, 1974 (Amtrak)." [A109-110].

Noting the conspicuous absence in Title II of the FECA of any civil remedy, public or private, in contrast with the supplemental civil remedy expressly provided by Congress in Title III of the FECA, Judge Aldisert stated [A112]:

> "I am persuaded that this is a classic case for the application of Amtrak's second principle which teaches: 'when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.' A legislative schema expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar 'principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*' "

The dissent points out that there is "no language in the Act manifesting Congressional intent to create a private right of action by implication" [A112] and that "appellant conceded at oral argument that the Congressional history is devoid of any reference to a private civil remedy." [A113].

2. (Cont'd.)
though Judge Aldisert made reference [A108-109] to his views on standing, as expressed in the dissenting opinion in *United States v. Richardson,* 465 F. 2d 844 (3d Cir. 1972), the dicta of the majority on these topics were deemed unnecessary for decision of the case in the dissenting opinion [A108-109] and are not raised here. The view on standing which prevailed in the Third Circuit at the time this case was decided below was later rejected in *United States v. Richardson,* — U. S. —, 42 U. S. L. W. 5076 (No. 72-885, Opinion filed July 25, 1974).

Adverting, *inter alia,* to the absence of constitutional authority in the federal judiciary to create subject matter jurisdiction for the federal courts, *Sheldon v. Sill,* 8 How. 440 (1850); *Ex Parte McCardle,* 7 Wall. 506 (1869), Judge Aldisert concluded [A115]:

> "[A]n imperative of a detached decisional process commands that neutral principles of construction be employed in all our cases because of the precedential or institutional effect of our determinations. To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code. And to do this is to suggest that for every written volume of Title 18 of the United States Code there is an unwritten volume of Title 28.
>
> "Because I cannot begin to accept this notion, I would affirm the judgment of the district court."

The majority of the panel below judicially created a private, civil right of action, not enacted by Congress, for alleged violation of § 610, in addition to the criminal sanction Congress provided, in spite of the absence of (i) any manifestation of Congressional intent in the language of the Act to create such a private cause of action, (ii) any legislative history evidencing Congressional intent to *imply* authorization for such a private right of action, and (iii) any jurisdictional provision, such as that relied upon in *J. I. Case Co. v. Borak,* 377 U. S. 426 (1964) conferring federal jurisdiction over the subject matter and supplying

a basis for implication of a private remedy, and (iv) in spite of the most serious doubt concerning the constitutionality of § 610 (which the Court nevertheless declined to resolve) and (v) in the face of the clear inference of Congressional intent not to create a private right of action, to be drawn from the conspicuous absence of a private remedy from the Title of the FECA containing § 610, as contrasted with the express provision for a private remedy in Title III of the FECA.

Petitioners filed a petition for rehearing and suggestion of rehearing *en banc* for a full, deliberate reconsideration of (1) the holding of the panel in the light of *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U. S. 453 (1974) ["the *Amtrak* case"] [3] (2) the serious constitutional implications of the panel decision, including the constitutionality of 18 U. S. C. § 610, and (3) the impact of this decision in precipitating and authorizing an avalanche of federal-question litigation neither impliedly nor expressly authorized nor contemplated by the Congress.

The petition for rehearing was denied by the Court of Appeals, without opinion, on May 15, 1974.

Petitioners' motion for a stay of mandate pending application to this Court for a Writ of Certiorari was granted by the Court below, by Order dated May 22, 1974, staying the mandate until June 21, 1974.

The Petition for a Writ of Certiorari, filed June 20, 1974, was granted by this Court on November 11, 1974.

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3. This Court's decision in the *Amtrak* case was handed down on January 9, 1974, after the briefs had been filed in this matter in the Court of Appeals. The case was argued before the Court of Appeals eight days later on January 17, 1974. At oral argument, Petitioners relied, *inter alia*, upon this Court's opinion in the *Amtrak* case. Further briefs on the point were not requested by the Court of Appeals.

SUMMARY OF THE ARGUMENT.

I.

Under settled principles of statutory construction, no private cause of action on behalf of registered voters and stockholders for alleged violations of 18 U. S. C. § 610 should be judicially "implied." There is no manifestation of Congressional intent either in the legislative history of § 610 or of the Federal Election Campaign Act of 1971 ("FECA"), as a whole, or within the four corners of the Act, to create or authorize a private remedy. Nor is there any general jurisdictional provision in the FECA, similar to § 27 of the Securities Exchange Act of 1934, relied on in *J. I. Case Co. v. Borak, supra*, as conferring federal jurisdiction over the subject matter and as supplying a basis for an inference of Congressional intent to create such a private cause of action.

On the other hand, Congressional intent to *withhold* a private remedy is clear. Congress expressly provided a private remedy under Title III of the FECA, but provided none under Title II of the FECA, which contains § 610, a circumstance which gives rise to the plain inference of Congressional intent not to create a private cause of action under § 610. The language, structure and legislative history of the Federal Election Campaign Act of 1974, a later statute *in pari materia* with the FECA, throw a "cross light" on the question of implication, confirming that Congress deliberately withheld a private cause of action for alleged violations of § 610, in the words of the Chairman of the House Conferees responsible for the Act, "to assure that civil suits are not misused in a partisan manner and that the complex and sensitive rights and duties . . . are administered expertly and uniformly."

In view of the chilling effect on the exercise of First Amendment rights which would result from implication of

a private cause of action from a statute purporting to prohibit expenditures for speech on public issues there are countervailing reasons of constitutional dimension against implication of such a private cause of action.

II.

Because the "expenditure" provision of § 610 on its face purports to prohibit expenditures for speech addressed to public issues and is, therefore, unconstitutionally overbroad, a narrowing construction should be adopted under the principle that of two equally obvious alternative constructions of a statute, that which clearly comports with the provisions of the Constitution is the construction to be adopted. To avoid serious constitutional doubt, the statute should be construed not to prohibit an expenditure for an advertisement which discusses public issues and does not mention the name of any political party or the name of any candidate for election to federal office.

III.

Section 610 is the paradigm of the unconstitutionally overbroad statute. On its face and as construed and applied by the majority below, § 610 includes within its indiscriminate sweep and makes criminal a broad spectrum of activity protected by the First Amendment. The Court below held, for example, that § 610 may outlaw the making of an expenditure for advertising which expresses views on issues of public significance and does not mention the name of any political party or the name of any candidate for election to federal office. It would even prohibit the making of an expenditure for the purpose of publishing voting records of Congressmen if deemed made for the purpose of "influencing" the nomination for election, or election, of any

person to federal office. This statute is not narrowly drawn. It evidences none of the "precision of regulation" which this Court has said "must be the touchstone in an area so closely touching our most precious freedoms." *N. A. A. C. P. v. Button,* 371 U. S. 415, 438 (1963). It is, in fact, a "broadside assault on the freedom of political expression guaranteed by the First Amendment" and it "cannot be squared with the First Amendment." *United States v. International Union United Auto Workers, supra,* 352 U. S. at 598 (dissenting opinion of Mr. Justice Douglas); *United States v. C. I. O., supra,* 335 U. S. at 155 (concurring opinion of Mr. Justice Rutledge).

IV.

Corporations enjoy a right to equal protection of the laws under the Due Process Clause of the Fifth Amendment and may not be subjected to arbitrary, invidious discrimination. Section 610's complete prohibition of contributions and expenditures in connection with federal elections, however, is applicable *only* to labor unions and corporations. Large, unincorporated business organizations, partnerships, politically potent voluntary associations and vast aggregations of wealth and power are entirely free of its prohibition. No compelling governmental interest justifies this discriminatory, total exclusion of corporations and labor unions, as a class, from the democratic process. There is no feature of the corporate form of organization which distinguishes it, in any way relevant to the discrimination created by § 610, from other partnerships, associations and organizations which are left unfettered by this prohibition. The discrimination created by § 610 bears no rational relationship to any legitimate governmental interest and is a denial of equal protection of the laws.

ARGUMENT.

I. The Decision of the Court Below Judicially Creating an "Implied" Private Right of Action Under 18 U. S. C. § 610, Not Authorized by Congress, Is Contrary to Controlling Decisions of This Court on the Criteria Governing the Implication of Private Remedies From Federal Penal and Regulatory Statutes.

Congress enacted, in the Federal Election Campaign Act of 1971 ("FECA"), 86 Stat. 3, a comprehensive and detailed statutory scheme, broadly regulating[4] numerous aspects of the conduct of federal election campaigns, establishing an administrative procedure for monitoring compliance with the Act and prescribing criminal penalties for violations of its penal provisions. Constituting the first comprehensive federal election campaign reform legislation since 1925, the FECA was apparently the final product of no less than 23 sets of congressional hearings on election reform since 1906,[5] scholarly research[6] and the work of a

4. While the constitutional authority is quite narrow, the power of Congress to enact comprehensive legislation under Article I, section 4 and Article II, section 1 of the Constitution, in the regulation of "[t]he Times, Place and Manner of holding Elections for Senators and Representatives" and "to determine the time of choosing the electors, and the day on which they shall give their votes," in connection with Presidential elections, has not been challenged in this case. *United States v. Classic*, 319 U. S. 229 (1941); *Burroughs and Cannon v. United States*, 290 U. S. 534 (1934); *United States v. Mosley*, 238 U. S. 383 (1915); *Ex Parte Yarbrough*, 110 U. S. 651 (1884); *Ex Parte Siebold*, 100 U. S. 371 (1879).

5. Remarks of Senator Hugh Scott, 117 Cong. Rec. 51913 (daily ed. Feb. 16, 1971).

6. A. Heard, *The Costs of Democracy* (1960); H. Alexander, *Financing the 1964 Election* (1966); H. Alexander, *Financing the 1968 Election* (1971); H. Alexander, *Money and Politics* (1972); H. Alexander, *Money, Politics and Public Reporting* (1960); H. Alexander, *Responsibility on Party Finance* (1963); H. Alexander & J. Bibby, *The Politics of National Convention Finances and*

Presidential Commission.[7]

Title II of the FECA sets forth amendments to criminal statutes, contained in Title 18 of the United States Code, relating to federal elections, including 18 U. S. C. § 610, the statute involved in this case. Section 610 broadly prohibits corporations and labor unions from making contributions and expenditures "in connection with" any federal election, and provides that an officer or director of any corporation, or officer of any labor organization who consents to such a contribution or expenditure is punishable by a fine of $1,000 or imprisonment for one year, or both.

Although the forerunner of § 610 was first enacted more than 65 years ago, in 1907,[8] and although it has, since then, been the subject of intensive reexamination and attention by Congress, and has been amended on numerous occasions,[9] Congress has never seen fit to create a private right of action for alleged violations of § 610 to supplement its penal sanction. In Title II of the FECA, Congress again provided no private right of action under § 610.

It is undisputed that there is no manifestation in the language of § 610, or of the FECA in its entirety, of any

6. (Cont'd.)
Arrangements (1968); H. Alexander & L. Denny, *Regulation of Political Finance* (1966); *Contributions of National-Level Political Committees to Incumbents and Candidates for Public Offices*, 1968 (T. Alexander & C. Jones ed. 1971). See also D. Adamany, *Financing Politics* (1969); D. Dunn, *Financing Presidential Campaigns* (1969); Committee for Economic Dev., *Financing a Better Election System* (1968); Twentieth Century Fund, *Voters' Time* (1969); Twentieth Century Fund, *Electing Congress—The Financial Dilemma* (1970).

7. President's Commission on Campaign Costs, *Financing Presidential Campaigns* (1962).

8. Act of January 26, 1907, c. 420, 34 Stat. 864.

9. Act of March 4, 1909, c. 321, sec. 83, 35 Stat. 1103; Act of February 28, 1925, c. 368, 43 Stat. 1070; Act of June 25, 1943, c. 144, § 9, 57 Stat. 167-168; Act of June 23, 1947, c. 120, Title III, § 304, 61 Stat. 159.

Congressional intent to create or permit a private right of action for an alleged violation of § 610. As Judge Aldisert noted in his dissenting opinion [A113], it is also conceded here that the legislative history of § 610 is devoid of any reference to a private civil remedy.

While no private remedy was provided by Congress in *Title II* of the FECA, Congress, in *Title III* of the Act, did expressly provide a civil remedy, to supplement the criminal sanctions provided in Title III for violations of that Title. Section 308(d)(1)-(5) of Title III[10] expressly sets forth the exclusive method enacted by Congress for private enforcement of the provisions of Title III of the Act. It provides that "any person who believes a violation of [Title III] has occurred may file a complaint with the supervisory officers." Upon receipt of a complaint pursuant to that provision, the supervisory officer investigates and if, in his judgment, any person has engaged in or is about to engage in any acts or practices in violation of any provision of

10. 2 U. S. C. § 438(d)(1)-(5). The text of § 438(d)(1) reads:

> "(d)(1) Any person who believes a violation of *this title* [Title III] has occurred may file a complaint with the supervisory officer. If the supervisory officer determines there is substantial reason to believe such a violation has occurred, he shall expeditiously make an investigation, which shall also include an investigation of reports and statements filed by the complainant if he is a candidate, of the matter complained of. Whenever in the judgment of the supervisory officer, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this title or any regulation or order issued thereunder, *the Attorney General on behalf of the United States shall institute a civil action for relief*, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond by such court."

Title III, the statute directs that the *Attorney General* "*shall* institute a civil action for relief" including injunctive relief.[11]

Against this background it is submitted the dissenting opinion below was correct in its statement that an implied right of action can be found here "only by defying the Supreme Court's recent pronouncement in *National Railroad Passenger Corp v. National Association of Railroad Passengers.*" *Ash v. Cort, supra,* 496 F. 2d at 426 [109-110].

A. The Decision Below Is Inconsistent With the Amtrak Case.

In the *Amtrak* case, the question was whether a private right of action can be implied from § 307(a) of the Rail Passenger Service Act of 1970 ("Amtrak Act") to enforce duties and obligations imposed by the Act and, specifically, to enjoin discontinuance of passenger service on the ground that such discontinuance was prohibited by the Act. This Court held that no such private right of action could be "implied" and reversed the decision of the Court of Appeals for the District of Columbia Circuit.

The principles applied in the *Amtrak* case are directly applicable to this case, and the majority below erred in failing to give effect to them. In *Amtrak,* the Court observed that "respondent has pointed to no provision of law outside the Amtrak Act itself that can be read to create or imply the cause of action that it seeks to bring against the petitioners," 414 U. S. at 456, and that "[i]t follows that support for the bringing of this action must be found, if at all, within the four corners of that act."

Here, as in *Amtrak,* there is no provision of law outside the FECA granting a private right of action under

11. Emphasis supplied throughout, unless otherwise stated.

§ 610, and there is no provision in the Act as a whole, or in § 610, for any such private remedy for alleged violation of § 610. Indeed, under the FECA there is not even a grant of federal subject-matter jurisdiction to the district courts to entertain civil actions to enforce § 610, as there was in § 307(a) of the *Amtrak* Act.[12]

The Court rejected the argument that a private cause of action should be implied from § 307(a) on behalf of the intended beneficiaries of the Act, noting that "the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent," 414 U. S. at 458, and that implication of a private cause of action was not consistent with the evident legislative intent:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U. S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.[13]

12. Section 307(a), 45 U. S. C. § 547(a), contains such an express jurisdictional grant:

> "If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, *the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States* or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, *to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.*"

This principle has long been recognized by the Court. *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 720 (1967); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246 (1951); *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 301 (1943); *Case v. Kelly*, 133 U. S. 21 (1890); *Ex parte McCardle*, 7 Wall. 506 (1869); *United States v. Wiltberger*, 5 Wheat. 76 (1820); *Marbury v. Madison*, 1 Cranch 137, 174-175 (1803).

This well-established principle finds specific application in those decisions holding that where Congress has expressly provided a particular civil remedy in one title of an act, but not in another title of the same act, it is to be inferred that Congress did not intend there to be a civil remedy in the title in which it did not expressly provide for one. *Calhoon v. Harvey*, 379 U. S. 134 (1964); *T. I. M. E., Inc. v. United States*, 359 U. S. 464 (1959); *cf. Nashville Milk Co. v. Carnation Company*, 355 U. S. 375 (1958).

T. I. M. E., Inc. v. United States, supra, involved the question whether there was an implied private right of action by a shipper against a certificated motor carrier for an overcharge under §§ 216(b) and (d) of the Motor Carrier Act of 1935, 49 U. S. C. §§ 316(b) and (d), which impose on carriers the duty "to establish, observe, and enforce just and reasonable rates, charges and classifications" and

13. 414 U. S. at 458.

which provide that "[a]ll charges made for any service . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful." The provisions involved were contained in Part II of the Interstate Commerce Act. Significantly, the right to litigate as to the reasonableness of past charges was expressly conferred in Parts I and III of the Act, relating respectively to rail and water carriers. Noting that "[t]he very provisions of Part I and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act," the Court refused to imply a private remedy under Part II where none had expressly been provided. 359 U. S. at 470.

The application of the rule to this case is clear. Congress expressly provided a carefully circumscribed private civil remedy for violations of Title III of the FECA in § 308(d)(1)-(5).[14] The narrow private remedy thus expressly granted in Title III supplements the penal provision of that Title, § 411, 2 U. S. C. § 441.

By contrast, Title II of the FECA, which includes § 610, *contains no such authorization* for a civil remedy to supplement the criminal sanctions expressly provided in Title II. This omission is a significant manifestation of Congressional intent that the penal sanctions of Title II be exclusive. This inference is buttressed by the fact that what discussion there is in the legislative history of enforcement of § 610 makes specific reference only to the Department of Justice. See 117 Cong. Rec. 43379 (Remarks of Mr. Hansen); 117 Cong. Rec. 43383 (Remarks of Mr. Thompson). The implication of a further, private cause of action

14. 2 U. S. C. § 438(d)(1)-(5).

under § 610 is, thus, inconsistent with the evident legislative intent.

There is no indication of contrary legislative intent in this case which would override this settled rule of statutory construction. The majority below points to no feature of the language or structure of the Act itself in support of its conclusion, and it was conceded in the Court below by Respondent that there is no legislative history evidencing Congressional intent to provide a private right of action for violations of § 610.

In the absence of any such Congressional intent, the decision of the Court below to "imply" a private cause of action from § 610 is an act of pure judicial legislation the reversal of which is required by *Amtrak* and the decisions of this Court in *Calhoon v. Harvey, supra,* and *T. I. M. E., Inc. v. United States, supra.*[15]

B. The Recently Enacted Federal Election Campaign Act Amendments of 1974 "Throw a Cross Light" on Congressional Intent Not to Provide a Private Remedy Under § 610.

On October 15, 1974, the President signed into law the Federal Election Campaign Act Amendments of 1974 ("FECAA"), P. L. 93-443, 88 Stat. 1263, amending the FECA.[16]

15. As Judge Aldisert said [A113] in his dissenting opinion: "Our polestar is Congressional intention. To imply such a right is to presume that Congress intended to provide for such an action, but overlooked its inclusion when the Federal Corrupt Practices Act was originally enacted, and that Congress overlooked it again when it enacted the comprehensive Federal Election Campaign Act of 1971. I cannot impute such derelictions to a Congress vitally concerned in a matter so universally discussed and the subject of manifest, if not all-consuming, public interest." *Ash v. Cort, supra,* 496 F. 2d at 428.

16. Title 18 U. S. C. § 610, itself, was amended in the FECAA only by the substitution in the second paragraph of § 610 of provisions increasing the penalties for violation. See Section 101(e)(1)(A)-(B) of the FECAA.

Although the FECAA was enacted after the decision of the Court of Appeals and is effective January 1, 1975, under an established doctrine of statutory construction it is appropriate to consider the "cross light" which the later enactment, *in pari materia* with the FECA, throws on the intention of Congress in enacting the earlier legislation. *Pipefitters Local Union No. 562 v. United States*, 407 U. S. 385, 427 (1972); *Michigan National Bank v. Michigan*, 365 U. S. 467, 481 (1961); *United States v. Hutcheson*, 312 U. S. 219 (1941); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 429 (2d Cir. 1945) (L. Hand, J.).

With respect to the provision for civil enforcement of the FECA, the new amendments follow the direction taken in Title III of the FECA, which granted a right to file a complaint with the election supervisory officers, with respect to alleged violations of Title III of the FECA. The FECAA makes this carefully limited remedy applicable to apparent violations of the title 18 criminal provisions of the Act, including § 610. The amendments create a Federal Election Commission ("Commission") composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six members to be appointed in a manner specified by the Act. Section 310(b) provides:

> "(b) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to this Act and sections 608, 609, 610, 611, 613, 614, 615, 616, and 617 of title 18, United States Code. *The Commission has primary jurisdiction with respect to the civil enforcement of such provisions.*"

Section 311 grants the Commission broad investigatory powers.

One salient feature of the FECA is retained in the civil enforcement procedures provided in the FECAA: no

private right of action in the District Courts is granted for alleged violations of § 610. Private civil enforcement is carefully restricted to the right to file a complaint with the administrative agency to which civil enforcement is committed. Section 314(a) of the FECAA, provides the exclusive procedure for private enforcement of the Act:

> "Sec. 314(a)(1)(A) Any person who believes a violation of this Act or of Section 608, 610, 611, 613, 614, 615, 616, or 617 of title 18, United States Code, has occurred may file a complaint with the Commission."

Section 314(a)(2) provides that, upon receiving a complaint, the Commission "shall notify the person involved of such apparent violation" and shall either report the apparent violation to the Attorney General or make an investigation of the violation. Section 314(a)(5), providing for civil enforcement of the provisions of the Act itself, authorizes *only the Commission*, upon investigation, to institute a civil action for relief "in the district court of the United States for the district in which the person against whom such action is brought, is found, resides, or transacts business":

> "(5) If the Commission determines, after investigation, that there is reason to believe that any person has engaged, or is about to engage in any acts or practices which constitute or will constitute a violation of this Act, it may endeavor to correct such violation by informal methods of conference, conciliation, and persuasion. If the Commission fails to correct the violation through informal methods, it may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person against whom such action

is brought is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, the court shall grant a permanent or temporary injunction, restraining order, or other order."

With respect to violations of § 610, the FECAA provides, in § 314(a)(6), that the Commission "*shall*" refer apparent violations of Chapter 29 of title 18, United States Code (which contains § 610) to the appropriate law enforcement authorities.

Civil enforcement of § 610 is dealt with in § 314(a)(7) of the FECAA, which authorizes *only the Attorney General,* upon request by the Commission, to institute a *civil* action for relief for violations of section 608, 610, 611, 613, 614, 615, 616 or 617 of title 18:

"(7) Whenever in the judgment of the Commission, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of title 18, United States Code, upon request by the Commission the Attorney General on behalf of the United States shall institute a civil action for relief including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond by such court."

Appellate review of district court enforcement orders is expressly confined by § 314(a)(9) to orders, entered after a showing that a person has engaged or is about to engage in acts or practices violative of the FECAA or of section 608, 610, 611, 613, 614, 615, 616 or 617 of title 18, United States Code, *granting* a permanent or temporary injunction or restraining order.

The only direct private action in the district courts authorized by the FECAA is an action under § 315 "*to construe the constitutionality of*" any provision of the FECAA or of section 608, 610, 611, 613, 614, 615, 616, or 617 of title 18, United States Code.

These amendments to the FECA reinforce the conclusion that Congress never intended to authorize, impliedly or otherwise, a private right of action under § 610. They show that Congress carefully balanced the interest in civil enforcement and in gathering evidence concerning alleged violations of the criminal code provisions, including § 610, against the necessity of preventing the potential abuses which would result from unrestricted private civil enforcement activities. By limiting the role of private civil enforcement to the filing of complaints with a responsible governmental agency possessing expertise in election matters, Congress harmonized these interests.

This case is virtually on all fours with *Amtrak*. Section 307(a) of the *Amtrak* Act expressly created only a public cause of action maintainable by the Attorney General to enforce the duties and responsibilities imposed by the Act. The only private cause of action created by that provision is expressly limited to "a case involving a labor agreement." In this case, § 610 mentions no private cause of action, and the only private remedy in the FECA, as originally enacted, is a right to file a complaint with the designated election supervisory officers regarding the provisions of a separate title of the Act. 2 U. S. C. § 438(d)(1)-

(5). The "cross light" shed by the FECAA leads to the same conclusion, mandated by *Amtrak*, that Congress provided a specific remedy, but deliberately withheld the private cause of action which was "implied" from the statute by the majority below.

But, as *Amtrak* makes plain, "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." 414 U. S. at 458. Not only is it conceded here that the legislative history of § 610 is devoid of any indication of Congressional intent to create a private cause of action under § 610, the legislative history of the recent amendments makes plain the Congressional intent in enacting the FECA to withhold any private cause of action for alleged violations of § 610. The legislative history spells out with unmistakable precision the substantial considerations which led Congress to that deliberate choice. Those reasons are articulated by the Chairman of the House Conferees, Mr. Hays, when in the presentation of the Conference Report to the House, he said:

"MR. HAYS.

* * *

Three important aspects of the legislation should be underlined. First, the House conferees successfully insisted that the Federal Election Commission created by the act have "primary jurisdiction with respect to the civil enforcement" of the act's provisions. *The current provisions of the United States Code regulating Federal elections, with one minor exception, state that violations shall be punished through the criminal law.* The bill before the House while retaining and strengthening these criminal sanctions provides also for a comprehensive system of civil enforcement. *In order to assure that civil suits are not misused in a partisan manner, and that the complex and sensitive rights and duties stated in the act are administered expertly and uniformly, the act provides that all civil complaints predicated upon or pertaining in any manner to titles I and III of the act or sections 608 through 617 of title 18 United States Code shall be channeled to the Commission.* Under section 315 persons challenging the constitutionality of any provision of the act, retain their right to do so in court without exhausting administrative remedies to the extent the courts have jurisdiction under established principles. *The delicately balanced scheme of procedures and remedies set out in the act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein.* It should also be noted that while judicial review is provided by section 314(a) when the Commission "grants" certain orders, a determination that there is no probable cause to believe that a violation charged has occurred, whether made by the Commission or the Attorney General, is not reviewable."[17]

It is submitted that application of the principles of statutory construction elaborated in *Amtrak* and the presence of a clear expression of legislative intent compel the conclusion that the majority below erred in finding an implied private cause of action under § 610.

C. The Majority Below Relied on Decisions Which Are Plainly Distinguishable.

The majority below in "implying" a private right of action under § 610, placed principal reliance on *Bivens v. Six Unknown Named Agents*, 403 U. S. 388 (1971); *Wyan-*

17. 120 Cong. Rec. (daily ed. October 10, 1974), H10330.

dotte Transportation Co. v. United States, 389 U. S. 191 (1967); and *J. I. Case Co. v. Borak,* 377 U. S. 426 (1964). Quite apart from the fact, demonstrated above, that the principles of the *Amtrak* case and the recently enacted FECAA and its legislative history make these cases inapposite, the cases themselves do not support the implication of a private remedy in the specific circumstances of this case.

In *Bivens,* the Court divided over the issue whether there may be an implied cause of action for monetary damages against a federal officer acting under color of his authority for searches and seizures in violation of a citizen's Fourth Amendment rights, an issue which had been reserved in *Bell v. Hood,* 327 U. S. 678 (1946). As the opinion of the Court was at pains to point out, *Bivens,* unlike this case, was not simply a controversy among private citizens, but involved the relationship between a citizen and the federal government. The Court said:[18]

> "Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. *An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.* Cf. Amos v. United States, 255 U. S. 313; United States v. Classic, 313 U. S. 299."

In dramatic contrast to the case at bar, in *Bivens,* fundamental personal interests of *constitutional* dimen-

18. 403 U. S. 391-392.

sion[19] were arrayed on the side of implication of a private right of action, because the remedy was urged for the further protection of Fourth Amendment rights against unchecked governmental power.

The same cannot be said of the case at bar. As the prior opinions of this Court in *United States v. C. I. O., supra,* and *United States v. International Union United Auto Workers, supra,* show, the mere *existence* of a *criminal* prohibition of expenditures for speech raises the most serious, fundamental questions of constitutionality under the First Amendment. When the matter is removed a step further, and the question is posed whether a private right of action may be "implied" from such a criminal statute, it becomes clear that in such a case, unlike *Bivens,* constitutional considerations are plainly arrayed *against* further expansion of the scope of the statute to subsume remedies not even provided by Congress.

Even under the unusually compelling circumstances of *Bivens,* the doctrine of separation of powers counsels strongly against implication of private remedies not enacted by Congress. *Bivens v. Six Unknown Named Agents,* 403 U. S. 388, 411-412 (dissenting opinion of Mr. Chief Justice Burger).

J. I. Case Co. v. Borak, supra, holding that private actions would lie to redress violations of §14(a) of the Securities Exchange Act of 1934, 48 Stat. 902-903, 15 U. S. C. §78n(a), likewise does not support implication of a private remedy in this case. In *Case,* reliance was placed upon the general jurisdictional provision contained in §27

19. Emphasizing the point, the Court distinguished *Wheeldin v. Wheeler,* 373 U. S. 647 (1963), on this very ground: "Nor are we asked in this case to impose liability upon a congressional employee *for actions contrary to no constitutional prohibition, but merely said to be in excess of the authority delegated to him by the Congress.* Wheeldin v. Wheeler, 373 U. S. 647." 403 U. S. at 396-397.

of the SEC Act, 15 U. S. C. § 78aa.[20] As the Court of Appeals for the District of Columbia Circuit noted in distinguishing *Case* in *Holloway v. Bristol-Myers Corporation,* 485 F. 2d 986, 1001 (D. C. Cir. 1973), "[t]he presence of this provision reduced the degree of 'judicial implication' brought to bear in developing a private remedy, since it provided a firm basis from which to begin the process of extrapolation."[21]

No analogous general jurisdictional grant provides a basis for the implication of a private remedy from § 610. In contrast with § 27, relied on in *Case,* the relevant jurisdictional provisions of the FECA and the FECAA are narrow and specific, expressly relating only to enforcement proceedings brought by the *Attorney General.* See 2 U. S. C. § 438(d)(1)-(5) and § 314(a)(7) of the FECAA.

The majority below likewise adopted an overly broad reading of the holding in *Wyandotte Transportation Co. v.*

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20. Section 27 of the Act provides, in part:

> *"The district courts of the United States,* the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States *shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.* Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. *Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business,* and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

21. It is not without significance that the SEC intervened in *Case* as *amicus curiae,* bringing to the Court's attention its limited resources and urging the recognition of private remedies as an adjunct, to its own enforcement powers. Brief of Securities & Exchange Commission as Amicus Curiae, *J. I. Case Co. v. Borak, supra.*

United States, supra, where it was held that the United States may recover from those responsible the cost of removing a private vessel negligently sunk in navigable waterways. There, the Court relied, in part, on the well-settled rule—inapplicable here—that the United States may sue to protect its interests. *Cotten v. United States,* 11 How. 229 (1851); *United States v. San Jacinto Tin Co.,* 125 U. S. 273 (1888); *Sanitary District v. United States,* 266 U. S. 405 (1925). Indeed, in *Sanitary District v. United States, supra,* a case which likewise involved the sovereign power of the United States to control the navigable waterways within its jurisdiction, Mr. Justice Holmes had stated that "[t]he Attorney General, by virtue of his office, may bring this proceeding, and no statute is necessary to authorize the suit. *United States v. San Jacinto Tin Co.,* 125 U. S. 273." 266 U. S. at 426. A further distinguishing feature in *Wyandotte* was emphasized by the Court. The Court there noted that the effect of adopting the view that, under the Rivers and Harbors Act of 1899, the United States could not recover the cost of removal of negligently sunken vessels would be to create an additional limitation of liability, inconsistent with the limitations theretofore expressly provided in the Limitation of Shipowners' Liability Act of 1851, 9 Stat. 935, as amended 46 U. S. C. § 181 et seq. Congress, however, had given no indication, in enacting the Rivers and Harbor Act, that it intended to alter or qualify the 1851 Act, and the Court relied on the congressional failure to connect the two statutes as further evidence that the inference of a limitation of liability to the salvage value of the sunken vessel was unwarranted. *Wyandotte Transportation Co. v. United States, supra,* 389 U. S. at 205-206.

No such general right to sue, analogous to that of the United States relied upon in *Wyandotte,* provides a basis for implication of a private cause of action from

§ 610 in favor of the *private* suitor in this case. Moreover, analysis of the legislative schema involved in this case, the FECA, rather than supporting the implication of a private remedy, compels the conclusion that Congress chose *not* to provide a private cause of action, a conclusion which is reinforced by the legislative history of the FECAA.

The majority opinion below is predicated on an unrestricted application of these cases, which do not, in fact, broadly grant the federal judiciary a roving commission to legislate causes of action where Congress has not done so. As Judge Aldisert noted in his dissent below, 496 F. 2d at 429, the broad reading of these cases results in a significant expansion of federal jurisdiction which is not authorized by Congress, the branch of government to which is committed the power to create subject matter jurisdiction for the federal courts:

> "I am persuaded that the Amtrak court could not fail to notice the plethora of implied civil remedy cases which arose from an unrestricted application of J. I. Case Co. v. Borak, *supra*, and an overgenerous use of Justice Black's overgenerous quotation in Bell v. Hood, 327 U. S. 678, 684 (1946), that 'federal courts may use any available remedy to make good the wrong done.' I am convinced that the Amtrak court consciously and deliberately applied the brakes and meant exactly what it said when it declared that a 'private cause of action not otherwise authorized by the statute' may not be implied in the absence of clear 'evidence of legislative intent.' "

This insistence on the necessity of a clear indication of Congressional intent is appropriate as an incident of the doctrine of separation of powers and is mandated by decisions of this Court. In *Wheeldin v. Wheeler*, 373 U. S. 647, 651 (1963), for example, decided one year before *J. I. Case Co. v. Borak, supra,* the Court said "[a]s respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co. v. Tompkins,* 304 U. S. 64. The instances where we have created federal common law are few and restricted." In that case, the Court refused to imply a private cause of action for abuse of the subpoena power by a federal officer. The Court went on to emphasize that "Congress has not done what was done in Textile Workers Union v. Lincoln Mills, 353 U. S. 448, and left to federal courts the creation of a federal common law for abuse of process." 373 U. S. at 652.

In *Nashville Milk Co. v. Carnation Company,* 355 U. S. 373, 377 (1958), the Court rejected the claim of a private right of action under § 3 of the Robinson-Patman Act, 15 U. S. C. § 13a, and said ". . . § 3 contains only penal sanctions for violation of its provisions; *in the absence of a clear expression of congressional intent to the contrary, these sanctions should under familiar principles be considered exclusive,* rather than supplemented by civil sanctions of a distinct statute. See *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.,* 236 U. S. 165, 174-175."

These familiar principles are reaffirmed in the *Amtrak* case and are applicable here. In the absence of such an indication of Congressional intent, a private cause of action not authorized by Congress is properly denied.[22]

22. *See e.g., Fagundez v. Oakland Raiders Professional Football Club,* 498 F. 2d 1394 (Temp. Emer. Ct. of Appeals 1974), (no implied private right of action under Economic Stabilization Act of 1970); *Holloway v. Bristol-Myers Corporation,* 485 F. 2d 986 (D. C. Cir. 1973) (no implied right of action under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45); *Lopez v. Luginbill,* 483 F. 2d 486 (10th Cir. 1973) (no implied private right of action under Title I of the Elementary and Secondary Education Act of 1965, 20 U. S. C. § 241 et seq.); *Flores v. George Braun Packing Company,* 482 F. 2d 279 (5th Cir. 1973) (no implied private right of action under the Immigration and Nationality Act, 8 U. S. C. §§ 1101(a)(15)(a)(ii), 1182(a)(14) or 1324); *Western Bancshares, Inc. v.*

D. In View of the Doubtful Constitutionality of § 610, the Court Below Should Have Restricted the Scope of the Statute Rather Than Expanding the Coverage of the Statute to Subsume Additional Remedies Not Authorized by Congress.

Finding an "implied" private right of action under § 610, the majority below said (496 F. 2d at 424):

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22. (Cont'd.)

Board of Gov. of Fed. Res. Sys., 480 F. 2d 749 (10th Cir. 1973) (no implied administrative authority under the Bank Holding Company Act of 1956, 12 U. S. C. § 1841 et seq.); *Vicenti v. United States*, 470 F. 2d 845 (10th Cir. 1972), *cert. dismissed*, 414 U. S. 1057 (no implied private right of action for damages under 25 U. S. C. §§ 345, 346, pertaining to claims by persons of Indian blood or descent for allotments of land); *Chavez v. Freshpict Foods, Inc.*, 456 F. 2d 890 (10th Cir. 1972), *cert. denied*, 409 U. S. 112 (no implied private right of action under the Immigration and Nationality Act, 8 U. S. C. §§ 1101, 1182, 1324 and 1325 and the Farm Labor Registration Act, 7 U. S. C. §§ 2041-2053); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F. 2d 81 (2d Cir. 1972) (no implied private right of action under the Rivers and Harbors Appropriation Act of 1899 for discharge of refuse into navigable waters); *Jordan v. Montgomery Ward & Co.*, 442 F. 2d 78 (8th Cir. 1971), *cert. denied*, 404 U. S. 870 (no implied private right of action under credit advertising requirement); *B. F. Goodrich Company v. Northwest Industries, Inc.*, 424 F. 2d 1349 (3d Cir. 1970), *cert. denied*, 400 U. S. 822 (1970) (no implied private right of action under § 5 of the Interstate Commerce Act); *Royal Services, Inc. v. Maintenance, Inc.*, 361 F. 2d 86 (5th Cir. 1966) (no implied private right of action under the Small Business Act, 15 U. S. C. §§ 631-647); *Blaney v. Florida National Bank at Orlando*, 357 F. 2d 27 (5th Cir. 1966) (no implied private right of action under § 2 of the Federal Reserve Act, 12 U. S. C. § 501a, 12 U. S. C. 92a, 93); *27 Puerto Rican Migrant F. W. v. Shade Tobacco G. A. A., I.*, 352 F. Supp. 986 (D. Conn. 1973) *aff'd*, 486 F. 2d 1052 (2d Cir. 1973) (no implied private right of action under the Wagner Peyser Act of 1933, 29 U. S. C. § 49 et seq.); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S. D. Tex. 1972) (no implied private right of action under National Environmental Policy Act of 1969, 42 U. S. C. § 4321 et seq.); *Danna v. Air France*, 334 F. Supp. 52 (S. D. N. Y. 1971), *aff'd*, 463 F. 2d 407 (2d Cir. 1972) (no private right of action for discriminatory Youth Fares under the Federal Aviation Act of 1958, 49 U. S. C. §§ 1301-1542).

"We note no countervailing reason for denying private remedies here. The matter before us involves none of the 'special circumstances' discussed in *Borak* as counseling denial of a private cause of action. See *J. I. Case Co. v. Borak, supra,* at 396-97 [sic]. Nor does § 610 involve the operation of a regulatory agency whose policy determinations on this or other matters might be threatened by allowing private enforcement. See *Holloway v. Bristol-Meyers Corp., supra* at 990-92, 997-1002. Thus, we find allowance of a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief, proper to remedy violation of § 610."

With deference, countervailing reasons as significant as any which are likely to be presented to the Court rule out judicial legislation of a private cause of action under § 610.

It is a cardinal principle of statutory construction that where the language of an act will bear two interpretations equally obvious, that one which avoids conflict with the provisions of the Constitution is to be preferred. *United States v. Vuitch*, 402 U. S. 62, 70 (1971); *United States v. National Dairy Products Corp.*, 372 U. S. 29, 32 (1963); *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341 (1936) (concurring opinion of Mr. Justice Brandeis); *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909); *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197 (1902). Whenever possible statutes are to be construed in a manner that not only upholds their constitutionality but also steers clear of constitutional uncertainty. *Lynch v. Overholser*, 369 U. S. 705, 710-711 (1962); *Flemming v. Nestor*, 363 U. S. 603, 617 (1960); *United States v. Harriss*, 347 U. S. 612, 618 n. 6 (1954).

That interpretation of legislation "which gives it the greater chance of surviving the test of constitutionality" is favored. *Ex parte Endo,* 323 U. S. 283, 299 (1944); cf. *United States v. Rumely,* 345 U. S. 41, 46 (1953). Perhaps the leading case on this point, *United States v. C. I. O., supra,* involved § 610, itself.

The majority below has "implied" from § 610 a private cause of action, not provided by Congress, in spite of the most serious doubt concerning the constitutionality of the statute. Its decision affords every registered voter in the country an unrestricted private remedy for injunctive relief to halt expenditures by any union or corporation for speech or publication of ideas whenever the expression involved is subjectively imagined to fall within the wide dragnet of § 610. It creates a potent weapon which one citizen or group in the community may now deploy to stifle or silence, *in advance,* expression of others on issues of the day.

Prior to the decision below, discretion to prosecute under § 610 was committed by Congress to the judgment of responsible public officials. Even thus confined in its use, the mere *existence* of this overbroad criminal provision has a chilling effect on the exercise of constitutionally protected rights under the First Amendment.

On a dubious rationale, the majority decision below *expands* the coverage of the statute to subsume new remedies not provided by Congress, creating a private remedy subject to the greatest potential for partisan abuse,[23] inviting frivolous suits by every imaginative voter, stockholder or union member with a desire for publicity at election-time. The implication of a private remedy under § 610

23. The recently enacted Federal Election Campaign Act Amendments of 1974, P. L. 93-443, and its legislative history, discussed *supra* at pp. 27-33, demonstrate that the potentiality of abuse of private suits was a prime reason why Congress deliberately withheld a private remedy. See 120 Cong. Rec. (daily ed. October 10, 1974), H10330.

will have an immediate and direct effect, encroaching not only the right of expression but on the right of the public to hear the presentation of all views on important issues as well—a result plainly contrary to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan,* 376 U. S. 254, 270-271 (1964); cf. *Branzburg v. Hayes,* 408 U. S. 665, 711-752 (dissenting opinions of Mr. Justice Douglas and Mr. Justice Stewart).

The same constitutional considerations which have led the Court to limit carefully even well-recognized common-law causes of action, such as libel and defamation, here provide compelling reasons against judicial creation of a private right of action under § 610, which Congress itself did not see fit to provide. As the Court has repeatedly emphasized, the freedoms of speech and of press must be afforded "adequate 'breathing space'" if they are to survive. *Rosenbloom v. Metromedia,* 403 U. S. 29, 50 (1971); *Time, Inc. v. Hill,* 385 U. S. 374, 388-389 (1967); *New York Times Co. v. Sullivan,* 376 U. S. 254, 271-272 (1964). The existence of the remedy "implied" by the majority below from a statute as overbroad as § 610, will, in view of the great potentiality for abuse, inevitably result in self-censorship and will thus create a danger that protected expression will be deterred. *Rosenbloom v. Metromedia, supra,* 403 U. S. at 50; *Speiser v. Randall,* 357 U. S. 513, 526 (1958).[24]

24. The majority stressed, in its assessment of the propriety of a private cause of action the potential efficacy of swift injunctive relief in private actions under § 610, 496 F. 2d at 423-424 [A103-104], but this rationale is constitutionally impermissible. Injunctive relief against publication or expression of views on vital issues would surely be barred by the doctrine of prior restraint. *New York Times Co. v. United States,* 403 U. S. 713 (1971); *Organization for a Better Austin v. Keefe,* 402 U. S. 415 (1971); *Near v. Minnesota,* 283 U. S. 697 (1931).

Finally, the implication of a private cause of action *only* with respect to corporations and labor unions, *not applicable to* voluntary associations, partnerships and unincorporated business entities, is a denial of equal protection of the laws. *Police Department of the City of Chicago v. Mosley*, 408 U. S. 92 (1962); *United States v. C. I. O., supra*, 335 U. S. at 154-155; *Grosjean v. American Press Co., Inc.*, 297 U. S. 233 (1936).

In view of these countervailing reasons, the Court of Appeals should have given effect to the rule of statutory construction requiring avoidance of constitutional questions and, instead of construing the statute to expand its coverage to subsume additional remedies not authorized by Congress, should have *restricted* the scope of § 610 to its express criminal sanction.

Application of settled principles of statutory construction here dictates that no private cause of action should be "implied" from § 610. There is no manifestation of Congressional intent in the language of the Act to create such a private cause of action. There is no legislative history evidencing congressional intent to imply authorization for such a private right of action. There is no jurisdictional provision, such as that relied upon in *J. I. Case Co. v. Borak, supra*, conferring federal jurisdiction over the subject matter and supplying a basis for implication. There are substantial constitutional considerations which rule out implication of a private cause of action. On the other hand, there is a plain inference of Congressional intent not to create a private remedy, to be drawn from the conspicuous absence from the title in question of any private remedy as contrasted with the express provision of a private remedy in another title of the same Act, and there is a clear, reasoned expression of Congressional intent deliberately to withhold the remedy.

For all of these reasons, the decision of the Court of Appeals "implying" such a remedy should be reversed.

II. The Majority Departed From Sound Principles of Statutory Construction in Adopting a Sweeping Construction of the Term "Expenditure" as Used in § 610.

Section 610 declares that "[i]t is unlawful . . . for any corporation whatever, or any labor organization to make a contribution or expenditure *in connection with*" any federal election. Section 205 of the FECA amended § 610 by adding the following language:

> "As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, adminstration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of

value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

Section 201 of the FECA amended 18 U. S. C. § 591 to provide the following definition of the term "expenditure" as used in § 610:

"§ 519. *Definitions.*

"When used in sections 597, 599, 602, 608, 610, and 611 of this title—

"(f) 'expenditure' means—

"(1) a *purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value* (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), *made for the purpose of influencing the nomination for election, or election, of any person to Federal office,* for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating covention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

"(3) a transfer of funds between political committees;

Section 610 thus imposes a complete prohibition against contributions and expenditures "in connection with" federal elections, which is applicable only to labor unions and corporations.

The Court below held that the term "expenditure" as defined in § 591 and employed in § 610, may include within its indiscriminate sweep an expenditure by a corporation or labor union for advertising or other publication of expression which does not mention the name of any political party or of any candidate for election to federal office. The construction thus adopted conflicts with a series of decisions in other circuits (based on language in *United States v. International Union United Auto Workers, supra*), holding that an expenditure by a labor union or corporation for advertising falls within the scope of § 610's prohibition only if the advertising is in the nature of "active electioneering." *United States v. Lewis Food Co.,* 366 F. 2d 710 (9th Cir. 1966), *reversing,* 236 F. Supp. 849 (C. D. S. D. Cal. 1964), *on remand from* 381 U. S. 908 (1965); *United States v. Anchorage Central Labor Council,* 193 F. Supp. 504, 507 (D. Alaska 1961); *cf. United States v. National Committee for Impeachment,* 469 F. 2d 1135 (2d Cir. 1972).

The Court below reached its conclusion on the question of statutory construction without reference to this uniform construction of the "expenditure" prohibition of § 610, and, unlike every other court which has faced this question of statutory construction under § 610, did so without addressing itself to the serious constitutional questions posed by such a construction. See *United States v. International Union United Auto Workers,* 352 U. S. 567 (1957); *United States v. Lewis Food Company, Inc.,* 366 F. 2d 710 (9th

Cir. 1966); *United States v. Painters Local Union No. 481*, 172 F. 2d 854 (2d Cir. 1949); *Ash v. Cort*, 350 F. Supp. 227 (E. D. Pa. 1972); *United States v. Lewis Food Company, Inc.*, 236 F. Supp. 849 (S. D. Cal. 1964); *United States v. Anchorage Central Labor Council*, 193 F. Supp. 504 (D. Alaska 1961); *United States v. International Union United Automobile Workers*, 138 F. Supp. 53 (E. D. Mich. 1956); *United States v. Construction & General Laborers Local Union*, 101 F. Supp. 869 (W. D. Mo. 1951); *United States v. Painters Local Union No. 481*, 79 F. Supp. 516 (D. Conn. 1948); *United States v. C. I. O.*, 77 F. Supp. 355 (D. D. C. 1948); cf. *United States v. National Committee for Impeachment*, 469 F. 2d 1135 (2d Cir. 1972).

The checkered history of the "expenditure" provision of § 610 is well known. *United States v. C. I. O.*, 335 U. S. 106 (1948), presented the question whether an expenditure for an editorial which appeared in the July 14, 1947, issue of a labor union newspaper entitled "The C. I. O. News," specifically urging the election of a candidate for Congress, was an illegal "expenditure" within the meaning of § 610.[25]

Applying the rule of statutory construction requiring that statutes be construed, where possible, to avoid constitutional doubt, five members of the Court affirmed dismissal of the indictment on the basis of a narrowing construction of § 610, under which the indictment failed to state an offense. The Court said (335 U. S. at 121):

25. According to the indictment, the editorial stated, in part: "* * * I take the opportunity to urge that all members of CIO residing and voting in the Congressional District in which this election is scheduled to take place cast their votes for Judge Garmatz, and make every effort to bring their neighbors and friends and to all persons eligible to vote in this election a full understanding of the issues involved and of the importance of voting for Judge Garmatz." Transcript of Record at 5, *United States v. C. I. O.*, 335 U. S. 106 (1948).

> "If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality."

Four members of the Court concurred in the result, but on the ground that the "expenditure" provision of § 610 is unconstitutional. In a penetrating concurring opinion for the minority, Mr. Justice Rutledge, joined by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy, analyzed the constitutional deficiencies of this provision and concluded (335 U. S. at 155):

> "A statute which, in the claimed interest of free and honest elections, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election, serving as a prior restraint upon expression not in fact forbidden as well as upon what is, cannot be squared with the First Amendment."

Although that case dealt with expenditures by a labor union, similar constitutional problems were raised in connection with its application to corporations. 335 U. S. at 153-155.

The "expenditure" provision of § 610 was again before the Court in the context of labor union expenditures for political advertising in *United States v. International Union United Auto Workers*, 352 U. S. 567 (1957). The indictment in that case charged the union with having made expendi-

tures from its general union treasury to defray the costs of television broadcasts, sponsored by the union over a commercial television station, which "*urged and endorsed selection of certain candidates* for representatives and senator to the Congress of the United States and included expressions of political advocacy intended by defendant to influence the electorate and to affect the results of the election." 352 U. S. at 584. The District Court dismissed the indictment, on the ground that it failed to state an offense under § 610. *United States v. International Union United Auto Workers,* 138 F. Supp. 58 (E. D. Mich. 1956).

On a direct appeal, this Court reversed. The majority held that the "expenditure" provision of § 610 prohibits an expenditure by a labor union for advertising addressed to the public at large which endorses or advocates the election of *particular* candidates for federal office or urges that the electorate vote at a federal election for a *particular* political party. The majority emphasized the narrowness of the holding (352 U. S. at 589):

> "The evil at which Congress has struck in § 313 [now § 610] is the use of corporation or union funds to influence the public at large to vote *for a particular candidate or a particular party.*"

Clear legislative history on the precise issue presented in that case precluded application of the rule of construction commanding selection of that interpretation which avoids the question of constitutionality. Adjudication of the constitutional issues was postponed, but, in framing the factual context deemed necessary for the resolution of the constitutional questions, the majority posed these questions (352 U. S. at 592):

> ". . . [W]as the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee? *Did it constitute active electioneering or simply state the record of particular candidates on economic issues?* Did the union sponsor the broadcast with the intent to affect the results of the election?

The term "active electioneering" was used in this context to refer to an advertisement addressed to the public at large which endorses the election of specific, *named* candidates for federal office or which urges the public at large to vote for a specific, *named* political party.[26]

The dissenting opinion in *United States v. International Union United Auto Workers, supra,* forcefully reiterated the position of the minority in *C. I. O.* and further demonstrated that the "expenditure" provision, applied to expenditures by a union to advocate election of particular persons or to urge the public at large to vote for a particular party, runs directly counter to the absolute command of the First Amendment and subverts the most fundamental value which that Amendment was designed to protect. Following the rule of statutory construction, the dissent argued for the adoption of a narrowing construction of the "expenditure" provision which would avoid the constitutional question:

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26. The term "active electioneering" appears to have originated in the Government's Brief in *United States v. International Union United Auto Workers, supra.* At page 51 of that Brief, the Government contended: "It is only when the union undertakes active electioneering, on behalf of particular federal candidates and designed to reach the public at large . . ." that the "expenditure" prohibition of § 610 is violated. This passage from the Government's Brief gains added significance from the fact that it is quoted verbatim in the legislative history of the FECA by the sponsor of the amendment. 117 Cong. Rec. 43379 (remarks of Mr. Hansen).

"These constitutional questions are so grave that the least we should do is to construe the Act, as we have in comparable situations, United States v. C. I. O., supra; United States v. Rumely, 345 U. S. 41; United States v. Harriss, 347 U. S. 612, *to limit the word 'expenditure' to activity that does not involve First Amendment rights.*

"*The Act, as construed and applied, is a broadside assault on the freedom of political expression guaranteed by the First Amendment.* It cannot possibly be saved by any of the facts conjured up by the Court. The answers to the questions reserved are quite irrelevant to the constitutional questions tendered under the First Amendment."

On remand in *United States v. International Union United Auto Workers,* the defendants were acquitted.

On the basis of the language in the majority opinion in that case suggesting the constitutional relevance of the concept of "active electioneering," the lower courts have developed, in a line of decisions without exception until the decision in this case, a test for determining the legality of expenditures for advertising under § 610, with the aim of avoiding serious constitutional problems. Under these cases construing the "expenditure" provision of § 610, only expenditures for advertising in the nature of "active electioneering" are deemed illegal under § 610.

Thus, applying the "active electioneering" test, in *United States v. Lewis Food Company,* 236 F. Supp. 849 (S. D. Cal. 1964), the District Court dismissed an indictment under § 610 which charged that the defendant corporation had made expenditures totalling $9,523.68 to publish an advertisement entitled "Important Notice to Voters" in at least fourteen newspapers. The advertisement in question listed by name 2 United States Senators, 30 members of the House of Representatives, 40 California State Senators, and 80 California State Assemblymen, stating each legislator's political party affiliation. Opposite each legislator's name appeared a "rating" expressed as a percentage, which the text of the advertisement explained showed "the percentage of his votes cast in favor of constitutional principles." The advertisement stated that "100% is perfect." Twenty-eight legislators identified as Democrats received scores of 0. No legislator identified as a Republican received a score of 0.

This Court remanded the Government's appeal of the dismissal to the Court of Appeals for the Ninth Circuit, 381 U. S. 908 (1965). Although reversal followed, in the Court of Appeals, *United States v. Lewis Food Company,* 366 F. 2d 710 (9th Cir. 1966), the Government conceded, and the Court of Appeals held, that an expenditure for advertising does not fall within the purview of § 610 unless the advertisement is in the nature of "active electioneering." 366 F. 2d at 712.

The "active electioneering" test was also applied in *United States v. Anchorage Central Labor Council,* 193 F. Supp. 504 (D. Alaska 1961), where it was held that no offence was stated under § 610 by an indictment charging that the defendants made expenditures for four fifteen-minute television broadcasts, intended to reach the general public, which "criticized the fitness of three of the candidates for Senator and Representative upon their 'record'." *Cf. also, United States v. National Committee for Impeachment,* 469 F. 2d 1135 (2d Cir. 1972); *Schwartz v. Rommes,* 495 F. 2d 844 (2d Cir. 1974).

The Court below, without discussing the bearing of prior decisions of this Court on the question of statutory construction involved here, and without discussing the

"active electioneering" test subsequently developed in the lower courts, ruled broadly that expenditures for advertising may violate § 610 even though the advertising expresses opinions on public issues and does not mention the name of any political party or of any candidate for election to federal office. Far from being "active electioneering" the Advertisement urges voters to:

> ". . . look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight.
>
> • • •
>
> "Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

If § 610 may truly be construed, as the Court below has done, to outlaw an expenditure for such an expression or to outlaw the incidental reply therein by a corporation to an accusation by an *unidentified* "candidate", and if that construction is allowed to stand, the expression of abstract ideas and of opinion finally will have been caught within the sweep of governmental power and made criminal. The most basic and fundamental principle will then have been discarded:

> "Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. *It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.*" 352 U. S. at 593.

The result reached by the majority below can be reached only by ignoring the repeated admonition of this Court that of two equally obvious constructions of a statute, that which is plainly in accord with the Constitution is the construction to be adopted. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909); *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197 (1902), and that statutes are to be construed in a manner that not only upholds their constitutionality but also steers clear of constitutional uncertainty. *Lynch v. Overholser*, 369 U. S. 705, 710-711 (1962); *Flemming v. Nestor*, 363 U. S. 603, 617 (1960); *United States v. Harriss*, 347 U. S. 612, 618 n. 6 (1964); *United States v. Jin Fuey Moy*, 241 U. S. 394 (1916).

It is difficult to imagine a context where this principle operates with greater force than where a criminal statute might otherwise encroach on First Amendment rights. See *United States v. Robel*, 389 U. S. 258, 262 (1967); *United States v. Rumely*, 345 U. S. 41, 45-47 (1953); *Schwartz v. Romnes*, 495 F. 2d 844, 852 (2d Cir. 1974); *United States v. National Committee for Impeachment*, 469 F. 2d 1135, 1140-1141 (2d Cir. 1972).

In *United States v. C. I. O., supra*, Mr. Justice Reed said of § 610, itself (335 U. S. at 120-121):

> ". . . [I]t is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment. It did not want to pass any legislation that would threaten interferences with the

> privileges of speech or press or that would undertake to supersede the Constitution. *The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality.*"

This case presents a question of statutory construction left open by the majority opinions in *United States v. C. I. O., supra,* and *United States v. International Union Auto Workers, supra.* In both of the previous cases, the Court was confronted with expenditures for "active electioneering," advertising endorsing a particular named candidate for election to federal office or an urging that the electorate [27] vote for a *particular named political party.* In this case, that element present in the two earlier cases is missing. Neither the Advertisement nor the Speech nor the Folder mentions the name of any political party or of any candidate for election to any federal office.

In Title II of the FECA, Congress amended certain of the criminal code provisions, relating to elections. Section 591 was amended to define the term "expenditure" as used in § 610. A similar definition of "expenditure" is found in Title III of the FECA in key provisions triggering reporting and disclosure requirements. See *United States v. National Committee for Impeachment, supra.*

Section 591 provides, in relevant part, that for an expenditure to fall within the scope of § 610's prohibition, it must be "*made for the purpose of influencing the nomination for election, or election, of any person to Federal office . . . .*" 18 U. S. C. § 591(f)(1). The subtle imprecision of the statutory language in § 591(f)(1) leaves the reach of the statute unclear in the precise situation pre-

27. In *C. I. O.,* of course, the challenged expression was not directed to the general public, but only to members of the union via the *C. I. O. News.*

sented in this case, where neither the Advertisement nor the Speech nor the Folder so much as mentions "any person" but do incidentally express opinions upon abstract issues. Although the drafting of § 591(f)(1) is problematical in other respects, the word chiefly responsible for its imprecision is the term "*influencing.*" The constitutional problem created by Congress' use of the word "influencing," and its other forms in legislation touching the exercise of First Amendment rights is not a new one for the Court. See e.g. *United States v. Harriss,* 347 U. S. 612 (1954); *United States v. Rumely,* 345 U. S. 41 (1953). Adopting a narrowing construction in *Rumely,* the Court construed a House Resolution authorizing investigation of " 'all lobbying activities intended to *influence,* encourage, promote, or retard legislation' " to cover only " 'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees.' " In *Harriss,* the Court cured a similar problem with the use of the term "influence" in § 307(b) of the Federal Regulation of Lobbying Act, which contained the phrase "[t]o *influence,* directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

It is submitted that in selecting the construction of "expenditure," as defined in § 591(f)(1), in § 610, which makes criminal an expenditure for advertising, not in the nature of "active electioneering," which does not mention the name of any political party or the name of any candidate for election to office, the majority below violated the settled principle which dictates that of two equally obvious alternative constructions of a statute, that which clearly comports with the provisions of the Constitution is the construction to be adopted.

On this question of statutory construction, in an area of the law where criminal sanctions are brought within

the very closest proximity to Constitutionally protected expression, the Court below should have followed the construction adopted by the Court of Appeals of the Second Circuit in *United States v. National Committee for Impeachment, supra.* In that case, the Government sought injunctive relief against the defendants who had placed a two-page advertisement in the "New York Times" entitled "A Resolution To Impeach Richard M. Nixon as President of the United States." The advertisement printed the names of Congressmen who had endorsed the proposed resolution as an "Honor Roll", and in the following language solicited funds to be used for political purposes:

> "The National Committee For Impeachment will devote its resources in funds and publicity in aid of any new candidate for election to the House of Representatives or re-election of an incumbent Member, whether in a primary contest or the actual election contest, whether Republican, Democrat, Independent, or a new party, in the order in which their names are officially printed in the Congressional Record. * * *"

The Court of Appeals for the Second Circuit rejected the Government's contention that the expenditure for the advertisement qualified as an "expenditure" under § 301 of the FECA and made the advertisers a "political committee" within the meaning of § 301, thus subjecting them to the reporting requirements of Title III of the Act. It was held that the definition of "expenditure" in Section 301 of the FECA, which closely parallels the definition of that term in Section 201 of the Act, 18 U. S. C. § 591(f)(1), and used in 18 U. S. C. § 610, does not encompass expenditures for advertising which derogates the stand taken by a particular candidate on any question.

The Court of Appeals for the Second Circuit outlined what it saw as the "abhorrent" consequences of the contrary view, adopted by the Court below:

> "We dispose more readily of the Government's suggestion that the Act applies to the National Committee because—quoting from the affidavit supporting its motion for a preliminary injunction—'With respect to the upcoming election for President and Vice-President of the United States, the National Committee derogates President Nixon's stand on a principal campaign issue—the Vietnam war.' On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with. Such a result would, we think, be abhorrent; the Government fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributions, or the like. On the Government's thesis every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a Golden Age Club promoting 'senior citizen rights' would fall under the Act. The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable." 469 F. 2d at 1142 (footnote omitted).

To adopt a construction here similar to that adopted in *United States v. National Committee for Impeachment, supra,* would be "in the candid service of avoiding a serious constitutional doubt," *United States v. Rumely,* 345 U. S. 41, 47 (1953), and the construction commends itself for application here. There is no indication in the legislative history that Congress intended the statute to apply to expenditures for advertising which expresses views on public issues and which does not even mention the name of any political party or the name of any candidate for election to federal office.[28] Construction of the statute in this fashion, moreover, would not seriously impair the effectiveness of the FECA in coping with the problem of expenditures for "active electioneering," the endorsement of named political parties or named candidates for election to federal office. It would, moreover, be in accordance with the cardinal rule that, where possible, the Court has the duty to adopt that construction which avoids serious constitutional doubt, and it would be based on well-established precedent. *United States v. Harriss, supra; United States v. Rumely, supra.*

But, the majority below in this case departed from that sound principle of statutory construction and selected the very construction which gives rise to grave questions concerning the constitutionality of the "expenditure" provision of § 610. The decision below has given such a sweeping connotation to the term "expenditure" in § 610 that the demarcation between criminal speech and legal speech is now impossibly beclouded, thereby aggravating the existing constitutional infirmities of the "expenditure" provision of § 610.

28. The legislative history of the FECA, on the contrary, emphasizes that Congress' concern was with expenditures for advertising in the nature of "active electioneering on behalf of *particular* federal candidates." *See, e.g.* 117 Cong. Rec. 43379 (remarks of Mr. Hansen).

For these reasons, the Court below should have held as a matter of law that the advertising in question was not in the nature of "active electioneering" and that the expenditure therefor was not "made for the purpose of influencing the nomination for election, or election, of any person to Federal office." The construction of § 610 adopted below should be rejected and the judgment below should be reversed.

III. On Its Face and as Construed and Applied by the Court of Appeals, § 610 Is Violative of the Freedoms of Speech, Press, Petition and Association Guaranteed by the First Amendment.

That § 610's blanket prohibition of contributions and expenditures by labor unions and corporations raises grave constitutional questions has been acknowledged in the prior opinions in this Court in *United States v. C. I. O., supra,* and *United States v. International Union United Auto Workers, supra.* In those cases, the Court narrowly avoided invalidating this restrictive statute, and the constitutional deficiencies received definitive elaboration in the opinions in those cases. The constitutional questions were expressly pretermitted in *Pipefitters Local Union No. 562 v. United States,* 407 U. S. 385, 400 (1972). As noted in the foregoing arguments, these serious constitutional questions are among the compelling reasons why "implication" by the Court below of an unrestricted private cause of action from this penal statute was unsound and contrary to law.

Although the Court below did not discuss any of the constitutional difficulties inherent in the question of statutory construction, those difficulties plainly invoke the rule that where a statute is susceptible of two constructions, one raising serious constitutional questions, and the other avoiding them, the Court's duty is to adopt the latter con-

struction. The majority below ignored that duty.[29] By reason of its conclusions, that there is an implied right of action for alleged violations of § 610 and that § 610 includes within its indiscriminate sweep expenditures for advertising, not in the nature of active electioneering, which does not mention the name of any political party or of any candidate for election to federal office, it became the duty of the Court below to reach the issue whether the statute, as thus construed by it, comports with the First and Fifth Amendments. This responsibility the Court below declined to assume.

Two important sources of constitutional protection establish the right of corporations to participate in the democratic process and to make expenditures[30] to engage in public debate on important national issues.

29. In spite of the duty to avoid constitutional difficulties, the majority adopted the view that the constitutional questions were not properly before it. 496 F. 2d at 426 [A108]. This position finds no support in the record. It is inconsistent with the facts (1) that the constitutional issues were clearly raised as bases for the motion for summary judgment in the District Court [A81], (2) that the motion was granted, by an order which did not restrict the grounds [A87], and (3) that Ash plainly presented the constitutional issues for review by the Court of Appeals [A89-91].

30. It is unnecessary to dwell on the threshold question, whether, consistent with the First Amendment, Congress may cripple speech it cannot directly prohibit by outlawing the expenditure of money necessary to make the speech effective. That question was definitively answered in the negative by Mr. Justice Rutledge in *United States v. C. I. O., supra*, 335 U. S. at 146. What Mr. Justice Rutledge said of unions is equally true of corporations: "Unions can act and speak today only by spending money, as indeed is true of nearly every organization and even of individuals if their action is to be effective." And, as was pointed out in *United States v. International Union United Auto Workers*, 352 U. S. at 594 (dissenting opinion of Mr. Justice Douglas): "It usually costs money to communicate an idea to a large audience. But no one would seriously contend that the expenditure of money to print a newspaper deprives the publisher of freedom of press. Nor can the fact that it costs money to make a speech—whether it be hiring a hall or purchasing time on the air—make the speech any the less an exercise of First Amendment rights."

First, precedents in this Court establish that the protection of the First Amendment encompasses the rights of corporations to engage in dissemination of ideas and to contribute to the flow of information and opinion in the marketplace of ideas. The Court addressed itself to this very issue in *Grosjean v. American Press Co., Inc.*, 297 U. S. 233, 244 (1936), and so held.[31] Citing *Grosjean* in the *C. I. O.* case, Justice Rutledge pointed out (335 U. S. at 154, 155), in the context of examining the constitutional issues posed by § 610, that:

> ". . . [I]t does not follow the broadside and blanketing prohibitions here attempted in restriction of freedom of expression and assembly would be valid in their corporate applications. *Corporations have been held within the First Amendment's protection against restrictions upon the circulation of their media of expression.* Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660. It cannot therefore be taken, merely upon legislative assumption, practice or judgment, that restrictions upon freedoms of expression by corporations are valid."

This general proposition has been reaffirmed in subsequent decisions of this Court. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 *rehearing denied*, 365 U. S. 875 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952); *Kingsley International Picture Corp. v. Regents of the University of New York*, 360

31. Clear precedents establish the standing of Petitioners to raise the constitutional issues. *United States v. Robel*, 389 U. S. 258 (1967); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Dombrowski v. Pfister*, 380 U. S. 479, 491-492 (1965); *Kunz v. New York*, 340 U. S. 290 (1951); cf. *Coates v. City of Cincinnati*, 402 U. S. 611, 619-620 (1971) (dissenting opinion of Mr. Justice White); see *Walker v. City of Birmingham*, 388 U. S. 307, 344-345 (1967) (dissenting opinion of Mr. Justice Brennan).

U. S. 684 (1959); *Times Film Corporation v. Chicago,* 365 U. S. 43 (1961); *Pennekamp v. Florida,* 328 U. S. 331 (1946); *Bridges v. California,* 314 U. S. 252 (1941); See, *Schwartz v. Romnes,* 495 F. 2d 844 (2d Cir. 1974); King, *Corporate Political Spending and the First Amendment,* 23 U. PITT. L. REV. 847 (1962).

The principle is, moreover, consistent with the second source of constitutional protection. The language of the First Amendment is cast not in terms of protection of any delimited sources of expression, but in absolute terms as a restraint upon Congressional power in this field. The First Amendment "protects the freedom of those activities of thought and communication by which we 'govern'. It is concerned not with a private right, but with a public power, a governmental responsibility."[32] As the Court said in *Red Lion Broadcasting Co. v. F. C. C.,* 395 U. S. at 390, "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana,* 379 U. S. 64, 74-75 (1964). See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. The right may not constitutionally be abridged either by Congress or by the F. C. C." What is involved here, then, is nothing less than the critically important process of public enlightenment which this

32. Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUPREME COURT REVIEW 245, 255.

Court identified time and again as the core concern of the First Amendment. *Stromberg v. California,* 283 U. S. 359, 369 (1931); *DeJonge v. Oregon,* 299 U. S. 353, 365 (1937); *Terminiello v. Chicago,* 337 U. S. 1, 4 (1949); *Smith v. California,* 361 U. S. 147, 153 (1959); *New York Times Co. v. Sullivan,* 376 U. S. 254, 269 (1964); *Time, Inc. v. Hill,* 385 U. S. 374, 389 (1967); *Branzburg v. Hayes,* 408 U. S. 665, 725-727 (1972) (dissenting opinion of Mr. Justice Stewart).

This fundamental constitutional concept cannot be squared with § 610's absolute prohibition. As Mr. Justice Rutledge stated in *C. I. O.* (335 U. S. at 144):

> "There is . . . an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it *necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance whether an individual or a group of the advantage of free and full discussion and of the right of free assembly for that purpose.*
>
> "The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent that they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function."

Section 610, by its flat prohibition of expenditures for political expression, cripples expression itself and seriously frustrates "the First Amendment goal of producing an informed public capable of conducting its own affairs . . . ." *Red Lion Broadcasting Co. v. F. C. C.,* 395 U. S. 367, 392 (1969).

Legislation such as § 610 which, on its face and in specific application, restricts the exercise of the freedoms

of speech, press, petition and assembly guaranteed by the First Amendment does not come before this Court with the usual presumption of constitutionality. *Thomas v. Collins,* 323 U. S. 516, 530 (1945); *Thornhill v. Alabama,* 310 U. S. 88, 95 (1940); *Schneider v. State,* 308 U. S. 147, 161 (1939). Rather, the presumption is that it is unconstitutional. *United States v. C. I. O.,* 335 U. S. 106, 140 (1948) (concurring opinion of Mr. Justice Rutledge); cf. *United States v. Carolene Products Co.,* 304 U. S. 144, 152, n. 4 (1938). Such legislation is subjected to "close judicial scrutiny" and must satisfy rigorous standards. Paramount among these standards is the requirement that legislation touching the exercise of First Amendment rights be narrowly drawn to meet the precise evil the legislation is intended to curb. *Cantwell v. Connecticut,* 310 U. S. 296 (1940); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *Schneider v. State,* 308 U. S. 147 (1939); *DeJonge v. Oregon,* 299 U. S. 353 (1937). As the Court has frequently reiterated, "[b]road prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *N. A. A. C. P. v. Button,* 371 U. S. 415, 438 (1963); *United States v. Robel,* 389 U. S. 258, 265 (1967); see *California v. LaRue,* 409 U. S. 109, 125-126 (dissenting opinion of Mr. Justice Marshall); *Aptheker v. Secretary of State,* 378 U. S. 500 (1964); *Shelton v. Tucker,* 364 U. S. 479 (1960).

Wholesale abolition of First Amendment rights by a statute flatly prohibiting expenditures for speech cannot survive these tests. As the Court said in *DeJonge v. Oregon, supra,* 299 U. S. at 364-365, "These rights may be abused by using speech and press or assembly in order to incite to violence and crime. The people through the legislatures may protect themselves against that abuse.

But the legislative intervention can find constitutional justification only by dealing with the abuse. *The rights themselves must not be curtailed.*" A statute which places a complete ban on corporate expenditures for expression on public issues violates the fundamental requirement that, in dealing with a permissible subject of legislation which is closely intertwined with the exercise of First Amendment rights, Congress must adopt the least drastic means. See *California v. LaRue,* 409 U. S. 109, 132 (1972) (dissenting opinion of Mr. Justice Marshall); *United States v. Robel,* 389 U. S. 258, 268 (1967); Note, *Less Drastic Means and the First Amendment,* 78 YALE L. J. 464 (1969).

On its face and as construed by the Court of Appeals, § 610 strikes at the very heart of protected expression. The statute not only may outlaw expenditures for the innocuous advertising involved in this case, which does not even mention the name of any political party or the name of any candidate for election to federal office. In *United States v. International Union United Auto Workers, supra,* the majority strongly implied that the prohibition of an expenditure made for the purpose of influencing the nomination for election, or election, of persons to federal office for advertising which "simply state[s] the record of particular candidates on economic issues" could not be sustained under any circumstances. 352 U. S. at 592. Section 610, on its face and as construed by the Court below, would include within its scope such an expenditure.

The statute would also outlaw an expenditure by a newspaper for the publication of an election-day editorial endorsing particular candidates for election to federal office. In *Mills v. Alabama,* 384 U. S. 214 (1966), however, the Court struck down just such a statute in voiding, on First Amendment grounds, an Alabama statute which prohibited election-day newspaper editorials urging read-

ers to vote in a particular way. Since no valid distinction may be drawn for First Amendment purposes between a political editorial and a paid political advertisement, § 610 is likewise invalid. *United States v. The National Committee for Impeachment, supra,* 469 F. 2d at 1140 n. 12, 1142 n. 15; *United States v. Painters Local Union No. 481, supra,* 172 F. 2d 854, 856.

A clearer example of unconstitutionally overbroad legislation is difficult to imagine. Obviously, no attempt has been made to draw the statute narrowly to curb the precise evil Congress intended to curb. The statute evidences none of the "precision of regulation" which this Court has said "must be the touchstone in an area so closely touching our most precious freedoms." *N.A.A.C.P. v. Button, supra,* 371 U. S. at 438.

The actual application of § 610 to protected speech, illustrated in the case at bar, is not its only vice. The statute shares the further characteristics of overbroad legislation. It has a clear deterrent impact or "chilling effect" on the exercise of constitutionally protected rights. See Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 853 (1970), and its imprecision invites arbitrary and discriminatory enforcement. *Grayned v. City of Rockford,* 408 U. S. 104, 108 (1972); *Papachristou v. City of Jacksonville,* 405 U. S. 156, 162 (1972); *Coates v. Cincinnati,* 402 U. S. 611, 614 (1971). The broad administrative discretion, which the construction adopted by the majority below would allow, would itself be incompatible with the First Amendment, which requires that administrative standards regulating free expression be narrow and clear. See, e.g., *Kunz v. New York,* 340 U. S. 290 (1951); *Saia v. New York,* 334 U. S. 558 (1948); *Cantwell v. Connecticut,* 310 U. S. 296 (1940); *United States v. National Committee for Impeachment,* 469 F. 2d 1135, 1142 (1972).

The clear warnings this Court has given concerning § 610 have been largely ignored by Congress. Despite the prior opinions of the Court in *C. I. O.* and *International Union United Auto Workers,* Congress has made no attempt to narrow the indiscriminate sweep of this restrictive provision, except for a crabbed accommodation of the narrow holdings of those cases in the FECA amendment to § 610. Indeed, the term "*influencing,*"—chosen as the central term for use in the new definition of "expenditure" in § 591(f)(1)—is the same term this Court has repeatedly been forced to narrow in legislation affecting the exercise of First Amendment rights. *United States v. Harriss,* 347 U. S. 612 (1954); *United States v. Rumely,* 345 U. S. 41 (1953). On its face and as construed by the Court below, the statute is inherently hostile to "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan,* 376 U. S. 254, 270-271 (1964).

The constitutional deficiencies of the offered rationale for such legislation were examined at length by Justice Rutledge in his concurring opinion in *C. I. O.* and are well-known.

It is argued that the governmental interest in maintaining the purity of elections from "undue influence" of labor unions and corporations justifies such legislation. But as Justice Rutledge observed, it is a fallacy to suppose that in *regulating* political expression, Congress may *abolish it altogether.* This is what § 610 does. And by what right does Congress regulate "undue influence" in political expression, at all, in the face of the command that "Congress shall make *no law* . . . abridging the freedom of speech, or of the press . . ."? Again, as Justice Rutledge pointed out in *C. I. O.* (335 U. S. at 145-146) ". . . 'undue influence' in this connection may represent no more

than convincing weight of argument fully presented, which is the very thing the Amendment and the electoral process it protects were intended to bring out . . . . But even if the right to sway others by persuasion is assumed to be subject to some curtailment, in the interest of preventing grossly overbalanced presentations, that right cannot be wholly denied . . . nor can it be restricted beyond what is reasonably and clearly necessary to correct an evil so gross and immediate that the correction indubitably outweighs the loss to the public interest resulting from the restriction." Section 610's solution is not one based on carefully drawn regulation; it is flat prohibition. The undue influence rationale proceeds on the paternalistic premise that the people are unable to attend properly to their own governmental affairs without intervention by the government. The First Amendment is predicated on the different and fundamentally conflicting philosophy that the people are able through free and open debate to consider and resolve their own destiny. As Mr. Justice Powell said in *Saxbe v. Washington Post Co.*, — U. S. — (No. 73-1265 June 24, 1974) "[i]t embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression. *Kleindienst v. Mandel*, 408 U. S. 753, 762 (1972); *Red Lion Broadcasting Co. v. F. C. C.*, 395 U. S. 367, 390 (1969); *Lamont v. Postmaster General*, 381 U. S. 301 (1965); *Martin v. City of Struthers*, 319 U. S. 141, 143 (1943)." The rationale of §610's prohibition cannot be reconciled with the First Amendment.

The suggestion that "protection" of disagreeing stockholders could supply a sufficient reason for the drastic effect of §610's flat prohibition of expression on public issues was also analyzed and rejected by Mr. Justice Rutledge in *C. I. O.* As he observed, "[t]he expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it." 335 U. S. at 143-144. As the majority said in *C. I. O.*, if the statute "were construed to prohibit the publication, by corporations . . . in the regular course of conducting their affairs, of periodicals advising their stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality." 335 U. S. at 121. If the asserted interest in "protection" of disagreeing stockholders does not rise to constitutional dimension to justify prohibition of communication to stockholders and customers, it plainly cannot rise to constitutional dimension to justify prohibition of expression on public issues when the intended recipients of the speech are the intended beneficiaries of the protection of expression afforded by the First Amendment, the public at large. The suggestion that the asserted interest of the disagreeing stockholders may be magnified to the point where that interest overrides an interest of constitutional dimension, the interest in preserving the free exchange of views on public issues and, with it, "the ability of our people through free and open debate to consider and resolve their own destiny" cannot be reconciled with the First Amendment.[33]

33. Fundamentally different constitutional questions may be presented regarding expression of bloc sentiment where membership in the group is governmentally required. See *Lathrop v. Donahue*, 367 U. S. 820 (1961); *International Association of Machinists v. Street*, 367 U. S. 740 (1961); *Railway Employees' Department v. Hanson*, 351 U. S. 225 (1956). Such considerations are not involved in this case.

As has been said before, if within the firstness of the First Amendment, there is a firstness also among the interests fostered by the Freedom of Speech and of the Press Clause, then it is the interest in the flow of politically relevant information to the public, and this essential of self-government cannot be destroyed by a sweeping prohibition which effectively silences important segments of the community and prevents debate on public issues.

For these reasons, the Court should declare § 610 unconstitutional and void as violative of the First Amendment.

IV. On Its Face and as Construed and Applied by the Court Below Section 610's Prohibition, Directed Only Against Contributions and Expenditures by Labor Unions and Corporations, Deprives Labor Unions and Corporations of Equal Protection of the Laws in Violation of the Fifth Amendment.

Although the Fifth Amendment contains no express equivalent of the Equal Protection Clause of the Fourteenth Amendment, it has been recognized that the right to equal protection of the laws is embraced within the scope of Due Process. It is settled that the federal government, under the Fifth Amendment Due Process Clause, has no greater license to create discriminatory classifications than do the states under the Equal Protection Clause of the Fourteenth Amendment. *Korematsu v. United States*, 323 U. S. 214, 234-235 (1944), *rehearing denied*, 324 U. S. 885; *United States v. Petrillo*, 332 U. S. 1 (1947); *Bolling v. Sharpe*, 347 U. S. 497 (1954), *opinion supplemented*, 349 U. S. 294 (1955).

It is well-established that a corporation is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment, and entitled to its full protection, *Grosjean v. American Press Co., Inc.*, 297 U. S. 233, 244 (1936); *Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105 (1928); *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1928); *Safeguard Mutual Insurance Co. v. Miller*, 472 F. 2d 732 (3d Cir. 1973). Corporations have a corresponding claim for equal protection of the laws under the Fifth Amendment, as against the federal government. *Jim Young Develop. Corp. v. State Highway Commission of Missouri*, 56 F. R. D. 38, 41 (W. D. Mo. 1971).

Section 610's prohibition of contributions and expenditures in connection with federal elections creates an unjustifiable discrimination in treatment of corporations and labor unions and does so in an area involving the exercise of fundamental rights. Since the classification thus created pertains to fundamental rights the constitutionality of § 610 must be judged by the standard of "close judicial scrutiny." *Shapiro v. Thompson*, 394 U. S. 618 (1969). "Classifications that discriminate against the exercise of constitutional rights per se . . . must be supported by a 'compelling' governmental purpose. . . ." *California v. La Rue*, 409 U. S. 109, 138 (1972) (dissenting opinion of Mr. Justice Marshall); *Police Department of Chicago v. Mosley*, 408 U. S. 92, 99 (1972).

Under § 610, the operative distinctions are (1) the content of the expression and (2) the identity of the speaker. However, "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of Chicago v. Mosley, supra*, 408 U. S. at 95; *Cohen v. California*, 403 U. S. 15, 24 (1971); *Street v. New York*, 394 U. S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U. S. 254, 269-270 (1964), and cases cited; *N. A. A. C. P. v. Button*, 371 U. S. 415, 445 (1963); *Wood v. Georgia*, 370 U. S. 375, 388, 389 (1962); *Terminiello v. Chicago*, 337 U. S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U. S. 353, 365 (1937).

Equal Protection moreover requires that statutes affecting First Amendment interests be *narrowly tailored* to their legitimate objectives. *Police Department of Chicago v. Mosley, supra,* 408 U. S. at 101; *Williams v. Rhodes,* 393 U. S. 23 (1968).

These are standards which § 610 cannot satisfy. There is neither a compelling governmental interest nor a rational interest which justifies classification of labor unions and corporations for the purpose of drastically limiting their rights to contribute to the operation of the democratic process. Section 610 does not prohibit voluntary associations, partnerships or the numerous large, unincorporated business organizations such as real estate investment trusts and other types of unincorporated trust organizations from making political contributions or from making expenditures in connection with federal elections. Section 610 does not prohibit contributions and expenditures by medical or farm organizations or any of the other types of organizations which become active in politics.

There is no characteristic either of the corporate form of organization or of labor unions which makes § 610's prohibition peculiarly appropriate as applied to them and not to other organizations. No interest justifies its selective restriction of the right of participation in governmental processes. This discriminatory provision, the very object of which is selectively to silence and sterilize politically two important segments of the community, cannot be reconciled with the guarantee of equal protection of the laws and has no place in an open society.

CONCLUSION.

For all of the foregoing reasons, Petitioners respectfully request that the Judgment of Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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APPENDIX A.

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18 U. S. C. § 610. Contributions or expenditures by national banks, corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Federal Election Campaign Act of 1971, P. L. 92-225.

Title II, Section 205:

Section 610 of title 18, United States Code, relating to contributions or expenditures by national banks, corporations, or labor organizations, is amended by adding at the end thereof the following paragraph:

"As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it

shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

Federal Election Campaign Act of 1971, P. L. 92-225.

Title II, Section 201:

Section 591 of title 18, United States Code, is amended to read as follows:

§ 591. Definitions.

"When used in sections 597, 599, 602, 608, 610, and 611 of this title—

"(a) 'election' means (1) a general, special, primary, or run-off election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and (5) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(b) 'candidate' means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or

election, to Federal office, if he has (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

"(c) 'Federal office' means the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

"(d) 'political committee' means any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

"(e) 'contribution' means—

"(1) a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;

"(3) a transfer of funds between political committees;

"(4) the payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; and

"(5) notwithstanding the foregoing meanings of 'contribution', the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee;

"(f) 'expenditure' means—

"(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection

of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

"(3) a transfer of funds between political committees;

"(g) 'person' and 'whoever' mean an individual, partnership, committee, association, corporation, or any other organization or group of persons; and

"(h) 'State' means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.".

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation



"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business--you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we aren't already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write: Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016

This Advertisement is scheduled to appear in Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and 19 Plant Town Newspapers, the Washington Post, and the Wall Street Journal.

SPEAK OUT FOR TRUTH

by

STEWART S. CORT
Chairman
Bethlehem Steel Corporation

Rotary Club
Jacksonville, Florida
June 12, 1972



Stewart S. Cort

The title of my talk consists of four words of advice: "Speak Out For Truth."

Why do I see this need? Because we've recently lived through a number of political primary campaigns—in Florida and in my own state, Pennsylvania—and it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a long presidential campaign ahead, during which we can clearly see a lot more of the same.

I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community. I'll give you a few examples of what I have in mind:

In a recent speech in Pittsburgh, a prominent presidential candidate said this: "What you have in Washington today is government of the money, by the money, and for the money. We're going to drive the money-changers out of the temple."

At a conference in Washington last month a potential presidential candidate said this: "To me, the ITT case says it all. The doors of the White House are open wide to every chairman of the board, but they are closed tight to the American working man."

As for business taxation, one of the candidates said this: "The time has come for a tax system that says to big business—you must pay your fair share."

That's a reasonable demand, but it implies that we aren't already paying our "fair share." My own company has been tagged with that sort of accusa-

tion despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 *billion* for the 10 years from 1962 through 1971.

So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden.

But corporations aren't the only targets. One candidate talks about "$28 billion in tax loopholes for the rich and powerful" and he calls for tax reform and other economic policies that, in the words of Chet Huntley, are "far to the left of Norman Thomas."

Put it all together and you'll see, as many observers have already warned, that business enterprise is sure to be a major issue during the upcoming presidential campaign. It's bound to be; the temptation is irresistible, at least to anyone who puts political advantage above all else.

As is perfectly clear to you, I don't share the views of those extreme critics of our society. But I certainly do admit that severe criticism is very much in fashion. It has all the earmarks of a vote getter. It'll get votes from the ideological extremes, from both extremes. It'll get votes from those who are terribly disillusioned, frustrated, and fearful. And it'll get votes from people who don't have that one commodity that has always sustained the American people, no matter how unhappy their circumstances —I refer to hope.

A campaign based on cynicism and mistrust will surely meet some measure of success because the way has been cleared by an army of malcontents. They've filled the bookshelves with volumes calling our society *The Sick Society*; branding the nation as *America, Incorporated*; saying we victimize the public *In The Name of Profit* and

deploring what has been called "Consciousness I and II." The illness and the cure are documented in what has been titled *A Populist Manifesto*.

And, when the Committee for Economic Development issued a booklet urging all business firms to accept a high degree of social responsibility, it was greeted with these words, written by one of the most prominent columnists for one of the country's most prominent newspapers:

> "The mania of maximization of profit seems to turn businessmen into economic Richard Specks, people so demented that they will have that last dollar although, if they were sane, they'd know that to make it they must sacrifice their own physical health and well-being."

With that sort of propaganda flooding us, no wonder a recent survey found that 46 percent of all Americans think big business is "dangerous to our way of life." This is plain nonsense. Would nearly every American family have a car if it weren't for so-called "big business"? Would we have telephones and television and indoor plumbing in most homes? Would we have the levels of education and nutrition and health care that, however imperfect, are the envy of most human beings elsewhere on this planet?

Well, I won't take your time defending "big business." Even when the critics aim their blasts at "big business," the fallout injures all businesses, big and small, and a lot of citizens who aren't even "businessmen."

Is this of any concern to you? You bet it is! Consider, for a moment, the current epidemics of shoplifting and vandalism. Sure, we've always had to contend with larceny and destructive individuals, but has this kind of conduct ever before been condoned by whole groups in our society? Today the so-called "rip-off" has become a sort of art form and

a folk religion.

Are businessmen the only ones who suffer because of shoplifting? You know the answer. We all suffer because of the resulting higher prices. We all pay the high costs of preventing vandalism and repairing its damages.

And let me read you a sad little item that appeared in one of our local newspapers on May 13th:

> "The owners of a shop in Allentown wanted to run a store which sold things to kids at reasonable prices, that didn't 'rip-off' the customers. In appreciation, the shoplifters went to work on them. 'The kids steal anything they can get their hands on and put in their pockets,' said one proprietor. 'We try to sell things at a low price, but it seems some people just have to steal'."

I don't think I have to add anything to that newspaper story. It speaks for itself. Ask yourself whether the situation will improve, or get worse, if the upcoming political campaign features the nation's leading politicians preaching that business is evil, that it makes excessive profits by gouging and cheating and deceiving the American public. It's something to think about.

Now let's take a look at another specific issue that ought to concern you and me. Everybody's talking about tax reform, but watch out for rhetoric about "closing the loopholes" that only benefit "the rich and powerful." As *The Wall Street Journal* commented the other day, one of the biggest so-called "loopholes" is the provision enabling homeowners to deduct mortgage interest and property taxes from Federal taxable income.

Well, there are many millions of homeowners in this country and they aren't all "rich and powerful." Most of them are just ordinary citizens. And, as a matter of fact, I always thought there was a

sound public policy behind those deductions—to encourage people to own their own homes. Take the deductions away and I doubt you'd prevent wealthy people from owning homes, but you'd surely make it tough on everybody else.

And, talking about personal income taxes, is there a single person here who thinks his taxes are too low? Well, there are candidates who think they're *way* too low.

And that's only the beginning. There are proposals to virtually confiscate inheritances over a certain amount; to end the tax exemption for state and municipal bonds; to reduce depletion and depreciation allowances; to outlaw the tax limitations on capital gains—you name it, somebody's talking about it.

But there's no need for me to go on and on. You've heard all those proposals, and I hope you see them as I do—not so much as threats to people who are wealthy, but threats to everyone who asks nothing more than the same opportunities that Americans have always had.

In fact, the avowed purpose of all those proposals is to give the government even greater power to redistribute income.

Now, don't get me wrong. The stated objectives are very worthy—to use that power to stamp out poverty; to improve health care; to provide jobs for every American; to eliminate the inequities in our society.

All those aims are wholly admirable and we should strive to achieve them. But is this the way to do it? I can't imagine how destroying individual incentive and confiscating savings can possibly provide more employment. It would, in fact, have the opposite effect.

But I won't quibble over specific points. Let me focus on the broadest aspect of this thing, and

that's the really important issue. What I have in mind is nothing less than individual freedom. The kind of collectivized society those people are talking about is the greatest threat on earth to our freedom.

In mid-May William F. Buckley gave a talk in my community. I wasn't able to attend, but the next morning's paper reported this:

> "Mr. Buckley said there is an increasing tendency of Americans to trade in their many freedoms for bits of economic and social security."

How right he is! Now, just by coincidence, another article appeared in the very same edition of the paper. It was a dispatch from the *Times* of London; maybe it appeared in your local papers.

It summarized a report from Sweden, and Sweden, as you probably know, is the most highly socialized country in the western world. The headline of this article was: "Sweden has harsh, ruthless society, report confirms."

The Swedes have free health care and cradle-to-grave security. But what does it cost them?

They have just about the highest prices in the world; they consume more alcohol per capita than any other people in the world; and they are suffering what amounts to an epidemic of mental breakdowns.

In the interests of equality, most things in Sweden are standardized. In the words of the report: "It is true that if you have seen one Swedish town, you've seen them all .... Swedish flats and houses are so much alike that you can enter any kitchen in the country and usually know where the rubbish bin is located." How'd you like living under those conditions?

But here's the worst part of it. Listen to this: "Many observers believe that some chilling aspects of the '1984' society appeared in Sweden several years ago." This type of society, writes the Swed-

ish psychiatrist who prepared the report, "leads to a prodigious, human-crushing process."

Is that what the so-called "populist" movement in America really wants—to crush the human spirit? One of the great ironies of it all is that the populist movement is seen as a rebirth of Jeffersonian philosophy. Now, that's a strange thing, because I've checked into what Thomas Jefferson thought this country is all about, and his ideas are remarkably fitting today.

Listen to these words on taxation and government spending, written in 1816:

> "... private fortunes are destroyed by public as well as by private extravagance. And this is the tendency of all human governments .... till the bulk of society is reduced to mere automatons of misery, to have no sensibilities left but for sinning and suffering .... And the fore horse of this frightful team is public debt. Taxation follows that, and in its train wretchedness and oppression."

As sure as I'm standing here, the economic programs now being preached by some political candidates would, if implemented, bring an end to democracy and freedom as we know it in this land, not overnight, but in the foreseeable future.

This is not to say that continual and gradual changes in our society aren't needed, and needed badly. There's still a lot of inequity in our land; there's a lot of poverty; there's a lot of suffering that must be remedied. But we must find a way to do it that doesn't stop our economy in its tracks—a way that doesn't wipe out the individual liberties that have made us a proud country, with every right to be proud.

That's more than enough moralizing. I'm not a philosopher; I'm a practical man. And that's why

I'd like to give a few practical suggestions. The political campaigns are coming. And, as I've pointed out, we know what a lot of the candidates are going to be saying. I say, let's keep them honest.

Right now, look at their declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups like this one, groups with a deep interest in good government, organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

One thing you can do is talk in advance with the communications media in this area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action.

I've quoted Thomas Jefferson before and I'll quote him just one more time. It seems that Jefferson didn't like long-winded speeches. In 1824, in a letter to the president of a debating society, he said this: "Amplification is the vice of modern oratory. It is an insult to an assembly of reasonable men, disgusting and revolting instead of persuading. Speeches measured by the hour, die with the hour." That's good advice, and I'll follow it. Thank you!

Public Affairs Department
Bethlehem Steel Corporation
Bethlehem, PA 18016

Booklet 2901 728, Printed in U.S.A.

How you can help to keep the campaign honest

There are many things you can do—either as an individual, or as a member of an organization—to help promote responsible, truthful campaigning by political candidates. We urge your full participation.

Become informed. Determine what the major issues are in this year's elections—such as Vietnam, inflation, taxes, unemployment, environment, foreign affairs, busing, and law and order. Read books, magazines, periodicals, and reports to gain background; read newspapers to follow current trends. Make a habit of watching televised news programs, and listening to radio reports. Discuss the issues with your friends, neighbors, and business associates.

In addition, find out what the candidates stand for. What are their proposals and political philosophy? What have their records been on major issues? What are their qualifications for office?

Prepare. Forewarn the communications media about possible false statements that could be made by political candidates. Also, advise newspaper publishers, editors, reporters, radio and television people, and magazine publishers of any fallacies in the political programs of candidates. Use

facts and illustrations, and give them the sources of your material.

If you work for a fairly large business organization, see to it that your sales people and legislative representatives are advised to report any false or misleading statements that come to their attention, so that appropriate rebuttal can be made. Encourage your executives to accept speaking engagements and to urge their audiences to keep candidates honest.

Be inquisitive. Scrutinize articles and speeches by candidates. When you encounter a statement that seems unlikely, or is inconsistent with your own knowledge, check on it. Your sources, of course, will vary with the subject you are researching, but the following may be useful to you: The Readers Guide to Periodical Literature, and the Public Affairs Information Service at your local library include a listing of current books, magazine and periodical articles, and government documents. Also, use encyclopedias and almanacs; informational services of chambers of commerce, and other local business associations. Keep in touch with the public affairs or public relations offices of major corporations or of national organizations such as the National Association of Manufacturers, the Chamber of Commerce of the United States, and various trade associations or technical societies. Or ask the candidate himself to provide the source of his information. If the facts contradict the statement you are researching, document your sources.

Correct the record. If you are attending an open meeting at which a political candidate—or anyone else—makes a statement you know to be wrong, stand up and question him, perhaps during the question and answer session. If that is not possible, or if you hear or read such a statement in the news media, write to the candidate, the radio and television stations or newspapers which publicized the incorrect information, and perhaps to local newspapers in areas where the statement was heard

or read. Make your communications positive in tone; cite relevant facts and figures to prove your point.

Follow up. To the extent possible, check future statements of the candidate to be sure he has corrected the wrong information he has been using. If he has, write and thank him. If not, some of the following steps might be indicated: write or wire the local, state, or national leader of the candidate's political party, asking that he or she intervene; write or telephone officials of your local news media, suggesting that they prepare an editorial on the situation and that they discuss the issue in their news articles or programs. Communicate again with the candidate, telling him of the steps you have taken and strongly urging him to correct the wrong information he is using.

Talk with people. Talk with everyone with whom you come in contact about your efforts to promote responsible campaigning. Discuss the incorrect statements that have been made, and tell your listeners who made them. Encourage them to become active in their own localities.

Finally, form "Truth Squads." Involve your friends, neighbors, church groups, business organizations, civic clubs and schools in the effort to promote truthful, honest political campaigning. Divide the research and communication work among members of the Squad and meet periodically to discuss issues and projects, and to share information. Have each participant communicate with the officials suggested above in every instance where an irresponsible or incorrect statement is identified.

Public Affairs Department
Bethlehem Steel Corporation
Bethlehem, PA 18016

Folder 2902 728, Printed in U.S.A.

IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,

Petitioners,

v.

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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QUESTIONS PRESENTED.

1. Did the Court of Appeals err in holding that a private cause of action exists under 18 U. S. C. § 610 on behalf of a stockholder and registered voter against a corporation or its directors who are found to be in violation of that statute?

2. Did the Court of Appeals err in reversing entry of summary judgment against plaintiff given: (a) that plaintiff's Complaint raises unresolved factual issues as to the alleged violation of 18 U. S. C. § 610; and (b) that there was an additional theory of recovery cognizable in Federal Court independent of the implication of a private cause of action?

3. Should this Court hold that 18 U. S. C. § 610, enacted as part of Congress' constitutional power to regulate federal elections, is in violation of the First and Fifth Amendments to the Constitution of the United States, especially in view of the fact that the Court of Appeals specifically refused to decide these issues and recognized that the District Court never passed on these Constitutional issues?

COUNTER-STATEMENT OF THE CASE.

On July 12, 1973, the United States District Court for the Eastern District of Pennsylvania granted defendants' motion for summary judgment without opinion. The grant of summary judgment was tantamount to a dismissal of the case for failure to state a cause of action cognizable in federal court. At the time summary judgment was entered, the record consisted only of a Complaint [A8], a First Amended Complaint [A69], Answers thereto [A20], and a minimal stipulation of agreed upon facts prepared in connection with a preliminary injunction motion heard October 20, 1972 [A28]. Plaintiff had had no discovery and his factual allegations were virtually untested.

Plaintiff Richard A. Ash, a stockholder of Bethlehem Steel Corporation and a voter, alleges that the directors of Bethlehem Steel Corporation ("Bethlehem") entered into a course of conduct and plan to utilize the corporation's resources, including the expenditure of funds, for the purpose of insuring victory for the Republican Party in the 1972 Presidential election. See First Amended Complaint paragraphs 13-15 [A72-A73]. The Complaint and First Amended Complaint alleged violations of the Federal Election Campaign Act[1] 18 U. S. C. §610 for illegal contributions and expenditures by Bethlehem and asserted a cause of action under both state and federal law.

Defendants in the courts below and again in this Court focus only on plaintiff's allegations relating to an advertisement, a reprint of a speech and a folder paid for and

1. This Act was originally titled the Federal Corrupt Practices Act. The Act was amended in 1971 by the Federal Election Campaign Act. Hereinafter, the statute will be referred to either as the Federal Election Campaign Act or the "Act."

disseminated by Bethlehem. However, as the Complaint and First Amended Complaint make clear, plaintiff has alleged a widespread misuse of corporate resources, including funds. This misconstruction of plaintiff's Complaint is compounded by the fact that at the hearing on the preliminary injunction motion (the only motion that resulted in an opinion in the district court), the evidence introduced pertained solely to the advertisement, the speech and the folder.

Defendants' summary judgment motion was not accompanied by affidavits. The lower court disregarded the substantial disputed issues and decided the summary judgment motion solely on the ground that plaintiff lacked an implied private cause of action under Section 610. The case has in a sense been bifurcated in its progress through the lower courts. Because defendants admitted that the advertisement, the folder and the speech were prepared and disseminated at corporate expense, both the District Court and the Court of Appeals devoted discussion to these items. The remainder of the allegations, claiming other misuse of corporate resources, has remained in the background. The District Court, as early as October 30, 1972, in its order denying a preliminary injunction, ruled that the advertisement did not constitute an expenditure within the meaning of 18 U. S. C. §610, observing that in the court's opinion the advertisement was not directed to the election of a specific person or persons to federal office. The Court of Appeals in its decision reversing the lower court's grant of summary judgment held that a private cause of action lies for violation of Section 610 and that the partisan nature of the advertisement was a fact genuinely disputed and able to be determined only after trial [A107-108]. It noted in passing the existence of a state cause of action. *Ash v. Cort* , 496 F. 2d 416, 419 n. 1 (3d Cir. 1974).

THE ADVERTISEMENT, SPEECH AND FOLDER PREPARED AND DISSEMINATED BY BETHLEHEM.

1. The Advertisement.

The Advertisement [A31] was mailed to plaintiff and all stockholders of Bethlehem along with a quarterly dividend on September 11, 1972. During the late Summer and Fall of 1972, the advertisement appeared in various media of national and local circulation including nineteen local newspapers in towns in which Bethlehem has plants. The Advertisement calls for the mobilization of "truth squads to keep the campaign honest," and states in the words of defendant Stewart S. Cort, Chairman of the Board of Bethlehem:

> "Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot of the same.
>
> "I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.
>
> • • •
>
> "As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: 'The time has come for a tax system that says to big business—you must pay your fair share.'"

2. The Cort Speech

The Cort Speech [A32-A41] is entitled "Speak Out For Truth" and was given at the Rotary Club of Jacksonville, Florida on June 12, 1972 by Bethlehem's Chairman of the Board, Stewart S. Cort. Bethlehem printed this speech in its entirety, referred to it in the advertisement stating that it would send it to all persons making a request, and did in fact so send it. The speech contains numerous commentaries on the pending Presidential election:

(a) Truthfulness in campaigns, p. 1 [A33]:

> "The title of my talk consists of four words of advice: 'Speak Out For Truth.' Why do I see this need? Because we've recently lived through a number of political primary campaigns—in Florida and in my own state, Pennsylvania—and it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a long presidential campaign ahead, during which we can clearly see a lot more of the same."

(b) Careless rhetoric and accusation in political campaigns directed at the business community, p. 1 [A33]:

> "I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community. I'll give you a few examples of what I have in mind: In a recent speech in Pittsburgh, *a prominent presidential candidate* said this: 'What you have in Washington today is government of the money, by the money, and for the money. We're going to drive the moneychangers out of the temple.' At a conference in Washington last month *a potential presidential candidate* said this: 'To

me, the ITT case says it all. The doors of the White House are open wide to every chairman of the board, but they are closed tight to the Americans working man.' " [Emphasis of references to candidates supplied]

(c) Whether business pays its fair share of taxes, pp. 1 and 2 [A33 and A34]:

"As for business taxation, *one of the candidates said this:* 'The time has come for a tax system that says to big business—you must pay your fair share.' [Emphasis of references to candidates supplied]

"That's a reasonable demand, but it implies that we aren't already paying our 'fare share'. My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden." [Emphasis supplied]

(d) Closing tax loopholes for the rich and powerful as being radical, p. 2 [A34]:

"But corporations aren't the only targets. *One candidate* talks about '$28 billion in tax loopholes for the rich and powerful' and he calls for tax reform and other economic policies that, in the words of Chet Huntley, are 'far to the left of Norman Thomas.' " [Emphasis supplied]

(e) Improper motives of those who make business enterprise an issue in the campaign, p. 2 [A34]:

"Put it all together and you'll see, as many observers have already warned, that business enterprise is sure to be a major issue during the upcoming presidential campaign. It's bound to be; the temptation is irresistible, at least to anyone who puts political advantage above all else."

(f) The effect of campaign attacks on business upon shoplifting, p. 4 [A36]:

" 'The owners of a shop in Allentown wanted to run a store which sold things to kids at reasonable prices, that didn't "rip-off" the customers. In appreciation, the shoplifters went to work on them.

"The kids steal anything they can get their hands on and put in their pockets," said one proprietor.

"We try to sell things at a low price, but it seems some people just have to steal".'

I don't think I have to add anything to that newspaper story. It speaks for itself Ask yourself whether the situation will improve, or get worse, if the upcoming political campaign features the nations leading politicians preaching that business is evil, that it makes excessive profits by gouging and deceiving the American public. It's something to think about."

(g) The danger to homeowners of closing tax loopholes, p. 4 [A36]:

"Now let's take a look at another specific issue that ought to concern you and me. Everybody's talking about tax reform, but watch out for rhetoric about 'closing the loopholes' that only

benefit 'the rich and powerful.' As *The Wall Street Journal* commented the other day, one of the biggest so-called 'loopholes' is the provision enabling home-owners to deduct mortgage interest and property taxes from Federal taxable income."

(h) The threat embodied in proposed tax reforms, p. 5 [A37]:

> "And talking about personal income taxes, is there a single person here who thinks his taxes are too low? Well there are *candidates* who think they're way too low.
>
> "And that's only the beginning. There are proposals to virtually confiscate inheritances over a certain amount; to end the tax exemption for state and municipal bonds; to reduce depletion and depreciation allowances; to outlaw the tax limitations on capital gains—you name it, somebody's talking about it.
>
> "But there's no need for me to go on and on. You've heard all those proposals, and I hope you see them as I do—not so much as threats to people who are wealthy, but threats to everyone who asks nothing more than the same opportunities that Americans have always had." [Emphasis supplied]

(i) The effect of tax reform upon employment, p. 5 [A37]:

> "All those aims are wholly admirable and we should strive to achieve them. But is this the way to do it? I can't imagine how destroying individual incentive and confiscating savings can possible provide more employment. It would, in fact, have the opposite effect."

(j) The relation of free health care and welfare to alcoholism and mental breakdown, p. 6 [A38]:

> "The Swedes have free health care and cradle-to-grave security. But what does it cost them?
>
> They have just about the highest prices in the world; they consume more alcohol per capita than any other people in the world and they are suffering what amounts to an epidemic of mental breakdowns."

(k) What the populist movement in America really wants, p. 7 [A39]:

> "Is that what the so-called 'populist' movement in America really wants—to crush the human spirit?"

(l) The threat to democracy and freedom of the economic programs of some political candidates, p. 7 [A39]:

> "As sure as I'm standing here, the economic programs *now being preached by some political candidates* would, if implemented, bring an end to democracy and freedom as we know it in this land, not overnight, but in the foreseeable future." [Emphasis supplied]

3. The Folder.

The Folder, [A42-A44], entitled "How You Can Help To Keep The Campaign Honest," was referred to in the Advertisement and was also made available to all persons upon request, along with a copy of the Cort Speech. Sources of information are recommended to the reader to check on the validity of statements made by candidates in articles and speeches. These recommended sources include: The Readers Guide to Periodical Literature, the Public Affairs Information Service at the local library,

encyclopedias, almanacs, informational services of chambers of commerce, local business associations, public affairs or public relations offices of major corporations or of national organizations such as the National Association of Manufacturers, the Chamber of Commerce of the United States, and various trade associations or technical societies [A43].

The Advertisement, the reprint of the Cort Speech and the Folder were prepared and paid for by Bethlehem with the use of corporate funds and without the approval of plaintiff Ash or any other stockholder.

Proceedings in District Court Prior to Judgment.

The action was commenced by Complaint on September 28, 1972. Plaintiff at that time moved for both a temporary restraining order and a preliminary injunction to prohibit Bethlehem from further corporate expenditures for the purpose of disseminating the advertisement, the speech and the folder. On October 13, 1972, the district court denied the temporary restraining order and on October 27, 1972, it denied the preliminary injunction motion, filing its only written opinion in the case [A46-A56]. Plaintiff appealed the denial of the preliminary injunction on November 1, 1972, and sought an injunction pending appeal. On about November 2, 1972, the parties agreed that plaintiff would withdraw the motion for injunction pending appeal conditioned upon a voluntary cessation by Bethlehem of distribution of the advertisement, the speech and the folder pending appeal. After expedited hearing, the Court of Appeals for the Third Circuit affirmed the denial of the preliminary injunction on January 5, 1973, with a two-paragraph opinion [A26], *Ash v. Cort*, 471 F. 2d 811 (3d Cir. 1973). The Court of Appeals held:

> "We affirm the denial of the request for a preliminary injunction. Our holding is narrowly limited. We affirm solely because we view as not clearly erroneous the district court's finding that appellant would not be irreparably harmed by the denial of his request."

On January 15, 1973, defendants moved for an order requiring plaintiff to post security for expenses of litigation under a provision of the Pennsylvania Business Corporation Law, 15 P. S. 1516, providing for security in some cases brought by shareholders to enforce rights of corporations. Defendants sought bond in the amount of $100,000 to indemnify the corporation for legal expenses, in the event judgment was entered against plaintiff [A65]. The district court entered an order, directing that plaintiff post a bond of $35,000 as to Count II, but, as to Count I, no bond was required. The order further gave plaintiff an opportunity to amend to eliminate Count II and thereby obviate bond [A68]. He did so by filing the First Amended Complaint. The order was a nullity, as Count II was not a separate claim, but merely an assertion that the state cause of action in Count I, under federal question jurisdiction, was also able to be adjudicated under principles of pendent jurisdiction.[2]

Plaintiff sought discovery from time to time, during the approximately six months the case was in the District

2. A statement of claim consists of a statement of operative facts that, in aggregate, give rise to a right enforceable in the courts. A court may not dismiss a theory of relief. Accordingly, the striking or dismissal of part of a single claim is a nullity. *Seaboard Machinery Corp. v. Seaboard Machinery Corp.*, 267 F. 2d 178 (2d Cir. 1959); *Marino v. Nevitt*, 311 F. 2d 406 (3d Cir. 1963); *Schwartz v. Eaton*, 264 F. 2d 195 (2d Cir. 1959); *Cooper v. North Jersey Trust Co.*, 226 F. Supp. 972 (S. D. N. Y. 1964).

Moreover, pendent jurisdiction need not be pleaded since the court already has jurisdiction. *Leathers Best Inc. v. S. S. Mormelynx*, 451 F. 2d 800, 809 (2d Cir. 1971).

Court, but was successfully opposed by defendants.[3] Defendants moved for summary judgment on March 29, 1973, and on March 30, 1973, they moved to stay discovery pending a ruling on their summary judgment motion. Among the contentions made by defendants was that the court should not find an implied private cause of action under 18 U. S. C. § 610 because the statute was adequately enforced by the Department of Justice. On July 9, 1973, plaintiff moved for an evidentiary hearing and an opportunity to call witnesses, offering to prove (1) that the Justice Department had historically failed to enforce 18 U. S. C. § 610; (2) that the Justice Department was intentionally made subservient to the reelection goals of the Republican Nixon administration in 1972; and (3) that the Justice Department lacked the requisite staff and resources to enforce the election laws, including 18 U. S. C. § 610 [A82-A86].

On July 12, 1973, the district court entered the following order, without opinion [A87]:

> "And Now, this 11th day of July, 1973, upon a finding that the issue whether plaintiff has an implied right to prosecute a cause of action under 18 U. S. C. § 610 is a question of law to be determined by the Court based upon, inter alia, the language, legislative history and purpose of the Act, It Is Ordered that plaintiff's motion for an evidentiary hearing and for continuation of defendant's motion for summary judgment is Denied. In addition, upon consideration of the entire record, oral argument and briefs submitted by the parties and upon a finding (1) that no legal basis has been presented by the plaintiff to justify the relief sought, and (2) that no genuine issues of material facts exist, It Is Further Ordered that defendants' motion for summary judgment is Granted."

3. The case was in the District Court from September 28, 1972 to November 1, 1972, when appeal was taken from the denial of a preliminary injunction, and from February 9, 1973 to July 12, 1973, when judgment was entered.

Appeal From Summary Judgment.

On July 18, 1973, plaintiff appealed to the United States Court of Appeals for the Third Circuit from the grant of summary judgment. On April 16, 1974, the Court of Appeals reversed the judgment of the district court and remanded for trial, finding the existence of an implied private cause of action under 18 U. S. C. § 610 and of genuinely disputed issues of material facts [A92-A117].

The Court of Appeals held:

(1) Plaintiff has standing as a stockholder, citizen and voter to assert this action [A97].

(2) That to find an implied cause of action in a statute, a court must determine that the provision violated was designed to protect a class of persons including the plaintiff from the harm of which plaintiff complains and that it is appropriate in light of the statute's purposes, to afford plaintiff the remedy sought [A98].

(3) 18 U. S. C. § 610 was designed to protect plaintiff as a stockholder and as a voter and citizen [A101].

(4) Private civil enforcement by injunction can be relatively swift, halting violations prior to elections [A104].

(5) There exist no countervailing reasons for denial of a private cause of action [A104].

(6) Allowance of a private cause of action, whether brought by a citizen to secure injunctive relief or a stockholder to secure injunctions or derivative damage relief is proper to remedy violations of § 610 [A104].

(7) 18 U. S. C. § 610, in specifying acts prohibited, supplements but does not supplant 18 U. S. C. § 591 as it defines "expenditure." [A106].

(8) 18 U. S. C. § 591 prohibits only partisan expenditures [A106].

(9) Communications are not saved from the purview of Section 610 merely because they do not mention candidates by name [A107-A108].

(10) Factual issues remain unresolved as to defendant's violation of 18 U. S. C. § 610.

The Court of Appeals refused to reach defendants' constitutional contentions, noting that they were predicated on the assumption that non-partisan speech was prohibited, that they were never considered or decided by the district court, and that they could be raised on remand.

Defendants petitioned for rehearing *en banc,* which the Court of Appeals denied May 15, 1974. Defendants' motion to stay the mandate of the Court of Appeals, pending disposition of the case in this Court was granted on May 22, 1974. On June 13, 1974, plaintiff moved to take discovery pending appeal in the District Court, which motion was denied on June 27, 1974. Plaintiff appealed this discovery denial on July 11, 1974. On November 15, 1974, the Court of Appeals expedited the appeal, and heard the matter on January 24, 1975. That appeal is pending.

SUMMARY OF THE ARGUMENT.

I.

Under settled principles of statutory construction, the Court of Appeals correctly implied a private cause of action on behalf of stockholders and citizens for violations of 18 U. S. C. § 610. The Court correctly found that plaintiff was within the classes of persons protected both primarily and secondarily by the Act and that policy considerations fully supported implication of a private cause of action, especially since there were no valid considerations opposing such implication. The Court of Appeals rightly perceived the intent of Congress to protect stockholders and citizens from unregulated corporate campaign contributions, and properly concluded that the provision of a private remedy is necessary to effectuate Congressional intent. The Court of Appeals recognized the specious reasoning that absence of an expressed private cause of action under Title II of the Federal Election Campaign Act leads to the conclusion that no such remedy should exist.

The Bethlehem directors contend that the court should disallow an implied cause of action to Respondent, even as a stockholder, based on this Court's recent decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U. S. 453 (1974). This case is clearly distinguishable in that, *inter alia,* the legislative history of the statute in question there clearly indicated Congressional intent to exclude a private right of action. Nor should this Court look to the history of subsequent legislation for evidence of Congress' intent in passing the legislation at issue.

II.

The Court of Appeals was correct in reversing the District Court's granting of summary judgment on the merits. 18 U. S. C. § 610 does not require the naming of a particular candidate for liability to attach. In addition, there are numerous material factual issues in dispute including, *inter alia*, whether the advertisement, speech and folder are "partisan". Under such circumstances, summary judgment can not be granted.

The First Amended Complaint states a valid claim under 28 U. S. C. §1331 independent of the implication of a private right of action. Expenditure of corporate funds in violation of federal law is *ultra vires* under Delaware law and actionable by stockholders. This cause of action, which turns on 18 U. S. C. § 610, arises under the laws of the United States within the meaning of 1331.

III.

The Court of Appeals was correct in refusing to decide the issue of the constitutionality of 18 U. S. C. § 610. Only after an adjudication on the merits will the constitutional issues be ripe for decision.

Assuming this Court does reach the constitutional issues, Bethlehem does not, as a corporation, enjoy the full protection of the First Amendment to the Constitution of the United States as does a natural person. Furthermore, under established law, 18 U. S. C. § 610 as amended in 1971 is a proper constitutional exercise of Congressional power to regulate elections and to protect our democratic electoral process. It is a narrowly drawn statute which does not violate the First Amendment.

Moreover, 18 U. S. C. § 610 does not violate the due process clause of the Fifth Amendment to the Constitution of the United States.

Argument.

I. Plaintiff Has a Private Cause of Action Under 18 U. S. C. § 610.

A. Standards for Implying a Private Cause of Action.

The Court of Appeals determined that an implied private cause of action is both necessary and appropriate for proper enforcement of the legislative goal embodied in the Federal Election Campaign Act, 18 U. S. C. § 610. In the instant case, there is no explicit indication on the face of the statute or in its legislative history of Congress' intent in regard to the establishment of a private cause of action. In such a case, the courts have conferred a private cause of action upon finding that the following two conditions are met: (1) that the provision was intended to protect a class of persons, including the plaintiff, from the harm of which plaintiff complains; and (2) that it is appropriate in light of the statute's purposes, to afford plaintiff the remedy sought. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U. S. 388, 395-97 (1971); *Wyandotte Transportation Co. v. United States,* 389 U. S. 191, 200-202 (1967); *J. I. Case Co. v. Borak,* 377 U. S. 426, 431-35 (1964). This principle is particularly applicable when, as here, the statute is criminal. *Texas and Pacific R. R. Co. v. Rigsby,* 241 U. S. 33 (1916).

Obviously where the legislature has clearly indicated its intent to grant or withhold a private cause of action, either implicitly or explicitly, the courts will give effect to such intent. *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U. S. 453 (1974) ("*Amtrak*" herein). In the absence of any such

clear legislative intent, courts have long realized that they must look to the policies underlying the substantive law to determine if the granting of a private cause of action would effectuate congressional policies. *Texas and Pacific R. R. Co. v. Rigsby,* 241 U. S. 33 (1916). Justice Harlan stated the rule in his concurring opinion in *Bivens v. Six Unknown Agents, supra:*

> ". . . in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." 403 U. S. at 403

Similarly, in *Burke v. Compania Mexicana de Aviacion,* 433 F. 2d 1031 (9th Cir. 1970), citing *Wyandotte Transportation Co. v. United States, supra,* the Court of Appeals for the Ninth Circuit succinctly summarized the appropriate set of circumstances from which an implied private cause of action is properly inferred:

> "Where the interest asserted by the plaintiff is within the class that the statute was intended to protect, the harm of the type the statute was intended to forestall, and the statutory criminal penalty inadequate to fully protect the asserted interest, a civil action for damages arises by implication." 433 F. 2d at 1034.

This well-established rule was applied by the Court of Appeals in holding that a private cause of action is implied under § 610.

B. Plaintiff Is Within the Class of Persons Protected by the Act.

The Court of Appeals determined that plaintiff Ash is a member of the class of persons that Congress intended to protect by the Act. See *Wyandotte Transportation Co. v. United States,* 389 U. S. 191, 201-202 (1967); *Texas and Pacific R. R. Co. v. Rigsby,* 241 U. S. 33 (1916); *Burke v. Compania Mexicana de Aviacion,* 433 F. 2d 1031, 1034 (9th Cir. 1970); *Reitmeister v. Reitmeister,* 162 F. 2d 691, 694 (2d Cir. 1947).

18 U. S. C. § 610 is the end product of a series of enactments limiting campaign contributions and spending. See *United States v. International Union United Auto Workers,* 352 U. S. 567, 570-84 (1957). This Court, in *United States v. Congress of Industrial Organizations,* 335 U. S. 106 (1948), stated that § 610 was designed to protect the electorate from the control over elections which corporations might exercise through financial contributions, and to protect stockholders and union members from the use of corporate or union funds for contributions to political parties without the consent of the stockholder or union member:

> "This legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contributions. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." 335 U. S. at 113

This comment is borne out by the legislative history of the predecessor of Section 610, the Act of January 26,

1907, 34 Stat. 864. In calling for that legislation, President Theodore Roosevelt stated that "all contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes." 40 Cong. Rec. 96. These purposes were emphasized in debates on the floors of both Houses in 1971 relating to the amendments to section 610. See Remarks of Senator Goldwater, 117 Cong. Rec. 29330, and Remarks of Representative Hansen, 117 Cong. Rec. 43380-81.

The Third Circuit correctly determined that these underlying purposes of § 610 support the inference that plaintiff is included among the classes of persons meant to be protected by the Act. The dissenting Judge agreed with the majority on this point, stating, "Standing in this case does not trouble me." 496 F. 2d 426. Indeed, as both a Bethlehem stockholder and a registered voter, there can be little doubt that plaintiff is a member of the two classes of persons which Congress intended to protect by the Act: registered voters and union members or stockholders of a corporation which violated the Act. This Court's decision in *United States v. Congress of Industrial Organizations, supra,* clearly establishes this proposition.

The case of *Common Cause v. Democratic National Committee,* 333 F. Supp. 803 (D. C. D. C. 1971) is directly on point. In that case the District Court found an implied private right of action under 18 U. S. C. §§ 608-609, companion statutes to 18 U. S. C. § 610. These statutes, proscribing limits for individual contributions and purchases in support of federal election campaigns and establishing limits to annual receipts and expenditures by political committees, were designed by Congress to protect voters, campaign contributors and workers. 333 F. Supp. at 812-13.

Plaintiffs in *Common Cause* included registered voters and the court concluded that the first of the standards for implying a private cause of action was met. 333 F. Supp. at 813. Plaintiff here is in even a stronger position than the plaintiffs in *Common Cause.* Not only is he a voter, but he is a stockholder in the corporation charged with the alleged acts and for that reason alone he is within a distinct class of persons protected by the statute. This was recognized by the court in *Barber v. Gibbons,* 367 F. Supp. 1102 (E. D. Mo. 1973). That court permitted a union member to sue under 18 U. S. C. § 610 for declaratory and injunctive relief.

C. Implying a Private Cause of Action Will Effectuate Congress' Purpose in Enacting 18 U. S. C. § 610.

Since the primary purpose of § 610 is to prevent corporations and labor unions from influencing federal elections by using their large financial resources, allowing private suits to enjoin or recover such expenditures is clearly consistent with the goals of the statute. As the Court of Appeals found, the implication of a private cause of action is particularly favored where it appears that the private remedy will have a "healthy deterrent effect" on the practices proscribed by the Act. 496 F. 2d at 423-24. See also *Hewitt-Robins, Inc. v. Eastern Freight-ways, Inc.,* 371 U. S. 84, 88 (1962). This deterrent argument is even more persuasive when it seems that the agency empowered to enforce the Act is not completely effective in doing so. See *J. I. Case Co. v. Borak,* 377 U. S. 426, 432 (1964); *Allen v. State Board of Elections,* 393 U. S. 544, 566 (1969); *cf. Holloway v. Bristol-Meyers Corporation,* 485 F. 2d 986, 998 (D. C. Cir. 1973).

The lack of adequate enforcement of § 610 was specifically alleged by Ash in his request for an evidentiary hearing [A82]; such inadequacy becomes apparent when the history of the enforcement of § 610 and its predecessors is considered.[4] Between the years 1916 and 1968 violations of the Act were very rarely prosecuted, especially against corporations, and even more rarely were convictions obtained.[5] The Third Circuit's opinion below specifically noted the problem of selective enforcement:

> "The nature of the prohibited conduct further supports provision of private remedies. Contributions or expenditures to influence federal elections are prohibited; yet the politician whose election is facilitated by violation of § 610 may be in charge of the statute's enforcement. This possible conflict of interest is not simply hypothetical; plaintiff alleges that in the instant case non-enforcement of § 610 by the Justice Department was due to the Department's control by the candidate defendants supported." 496 F. 2d at 423.

In addition, the district court in *Common Cause,* 333 F. Supp. 803 (D. C. D. C. 1971), implied a civil cause of action for violation of § 608 and § 609 of the same Act by also noting the Justice Department's inability to ensure

4. 18 U. S. C. § 610 was originally enacted as part of Tillman Act of 1907, ch. 420, 34 Stat. 864. In 1925 it was amended and included in the Federal Corrupt Practices Act of 1925, ch. 368, Title III, § 313, 43 Stat. 1074.

5. E. M. Epstein, Corporations, Contributions & Political Campaigns Federal Regulation in Perspective 15-16 (1968). See also Berry & Goldman, Congress and Public Policy; A Study of the Federal Election Campaign Act of 1971, 10 Harv. J. Legis. 331 (1973).

full enforcement of the Federal election laws. 333 F. Supp. at 809-813. See *Testimony of Deputy Atty. Gen. Kleindienst,* Hearings before the Subcommittee on Commerce (S. 1, S. 382, S. 956) 92nd Congress, 1st Sess. pp. 514-546 (March 31, 1971), and Hearing Before The Subcommittee on Privileges and Election of the Committee on Rules and Administration (S. 382) 92nd Cong., 1st Sess. pp. 50-67 (May 24, 1971); *Powell v. Katzenbach,* 359 F. 2d 234 (D. C. Cir. 1965); *United States v. Cox,* 342 F. 2d 167 (5th Cir. 1965).

The Court of Appeals, therefore, was merely following the well-established proposition that the impact of remedial legislation is enhanced when individual citizens are permitted to enforce the legislation.[6] See also *Schwartz v. Romnes,* 357 F. Supp. 30 (S. D. N. Y. 1973), *rev'd on other grounds,* 495 F. 2d 844 (2d Cir. 1974); *Barber v. Gibbons,* 367 F. Supp. 1102 (E. D. Mo. 1973).

Additional support for the implication of a private cause of action lies in the insufficient deterrent effect of the criminal sanctions provided in § 610. An examination of the sanctions provided in § 610 reveals that, as in other corporate crimes:

> "[T]he criminal fine as presently administered against the endocratic corporation . . . is totally ineffective as a profit diminishing sanction. Its ineffectiveness is primarily attributable to the exceedingly low maximum penalties permitted by governing statutes.[7]

6. See Comment, The Federal Election Campaign Act of 1971; the Reform of the Political Process? 60 Geo. L. J. 1309, 1328 (1972).

7. Comment, Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions, 71 Yale L. J. 280, 285-86 (1961).

The maximum fine that can be imposed on a corporation under § 610 is $10,000 for a willful violation. The ineffectiveness of such fines is obvious for they are imposed on the innocent stockholders.[8] Holding the directors accountable to stockholders is entirely appropriate to ensure that the integrity of the electoral system will be preserved.

The Court of Appeals stressed the relative expeditiousness of civil suits as compared to criminal actions and the probable vigilance of shareholders in detecting violations that threaten their economic interests. The Court stated:

> "The section's primary focus is on preventing the corruption of elections by corporate contributions. Violations of § 610 are, we presume, most likely to occur in the period immediately preceding an election, and, given the delays incident to criminal investigation and grand jury indictment as well as trial, the election may well be over before the section's violation is determined. Private enforcement, particularly by injunction, can be relatively swift. 496 F. 2d at 423-424

It is clear, and the Court of Appeals recognized, that this Court's recent holding in *Amtrak*, refusing to permit a private cause of action under § 307(a) of the Rail Passenger Service Act of 1970, is not controlling in this case. 496 F. 2d at 421-22. Contrary to the arguments of the Bethlehem directors, the rationale of *Amtrak* was carefully considered and followed by the court below. The tenets of statutory construction enunciated by this Court in *Amtrak* are identical to those relied upon by the Court

8. Increasing Community Control Over Corporate Crime, *supra*, n. 5, 71 Yale L. J. at 280.

of Appeals in construing § 610. In both *Amtrak* and the Court of Appeals' opinion in *Ash*, it was recognized that a private cause of action will not be implied from a federal statute if the expressed statutory remedies are intended to be exclusive. While the maxim "*expressio unius est exclusio alterius*" is a helpful guide, of course the courts must implement congressional intent as discerned from all available sources. As the Third Circuit appropriately pointed out in *Ash*, specifically in reference to this Court's holding in *Amtrak:*

> "This rule of statutory construction [*expressio unius est exclusio alterius*] does not alter the process used to determine if a cause should be inferred in the absence of statutory language indicating legislative intent; rather, it aids the court merely in determining when legislative intent to preclude a remedy can be fairly implied." 496 F. 2d at 421

In *Amtrak*, this Court concluded that the remedies expressed on the face of the statute could logically be said to be exclusive. 414 U. S. at 458. No such finding may be made in the instant case. In *Amtrak* the statute provided for a remedy of a civil action to be prosecuted by the Attorney General for alleged violations. In the instant case, the statute provides no civil remedy for the harms plaintiff sues to correct. While the directors point out that Title III of the Federal Election Campaign Act of 1971 provides a civil cause of action, this case is brought under a different statutory provision, the Federal Corrupt Practices Act, 18 U. S. C. § 610, as amended by Title II of the Federal Election Campaign Act. Title III pertains to certain reporting and disclosure requirements imposed on candidates and

campaign committees. Plaintiff, however, is sueing under an entirely different statutory provision for entirely different harms. The directors' reliance on the *expressio* maximum is misplaced; while it may indicate legislative intent not to permit a private cause of action under Title III of the Federal Election Campaign Act, it says nothing about Title II, 18 U. S. C. § 610.

Moreover, *Amtrak* turned on the finding that a private cause of action would be contrary to a basic purpose of the Act—to protect the railroads from private litigation which may endanger the "economic viability (of) a basic rail passenger system." 414 U. S. at 463. In contrast, the purpose of 18 U. S. C. § 610 would be well served by permitting a voter and shareholder to recover illegal campaign contributions.

More importantly, an amendment to the Rail Passenger Service Act of 1970 which would have permitted a private cause of action was specifically considered and rejected by Congress.[9] Thus, in *Amtrak* there was explicit and specific evidence of Congressional intent to exclude a private cause of action. As the Court of Appeals noted, in this case there is a lack of evidence in the legislative history that Congress considered a civil remedy in passing the Federal Election Campaign Act or the Federal Corrupt Practices Act. In order, therefore, to effectuate Congressional intent, it is necessary to look to the policies and purposes of the election statute in determining whether it is appropriate to imply a private cause of action. Neither the *Amtrak* case nor the judicial maxim "*expressio unius est exclusio alterius*" dictates a contrary result.

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9. Supp. Hearings on H. R. 17849 and S. 3706 before Subcommittee on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong. 2d Sess., SEF-9-62 at 134 (1970). See also 414 U. S. at 459.

The courts have consistently held that the implication of a private civil remedy is harmonious with an explicitly provided criminal remedy. *Wyandotte Transportation Corp. v. United States,* 389 U. S. 191 (1967). In *Texas and Pacific R. R. Co. v. Rigsby,* 241 U. S. 33 (1916), this Court inferred a private cause of action for a violation of a criminal statute and established the rule that the statutory provision of a penal remedy may imply the need for a remedial private civil cause of action. In the case *sub judice* there is a definite need for a remedial private cause of action. Only by permitting a stockholder whose corporation has made illegal campaign contributions from corporate funds or a voter whose franchise has been damaged by the influence of the criminal use of corporate funds to sue, will violations of the Act be remedied and Congressional purpose served. The criminal penalties provided by 18 U. S. C. § 610 are clearly inadequate as remedies for violations of the Act.

Not only do criminal penalties fail to compensate stockholders, they compound their loss by draining additional corporate funds which ultimately belong to them. Stockholders' abilities to control expenditures of funds is limited to voting the directors out of office or suing to enjoin misappropriations. In large corporations, such as Bethlehem, the latter alternative is the only one feasible. It would be anomalous for Congress to legislate to protect stockholders from illegal contributions of corporate funds while withholding from stockholders the only effective means for securing such protection. Surely Congress could not have intended such a result. In *City of Phoenix v. Drinkwater,* 46 Ariz. 470, 52 P. 2d 1175 (1935), the Supreme Court of Arizona used a similar analysis to imply a private cause of

action for workers damaged by violations of a minimum wage law.[10]

The recent decision in *Stewart v. Travelers Corp.*, 503 F. 2d 108 (9th Cir. 1972), is directly on point. The statute before the Court in *Stewart* was the Consumer Credit Protection Act, 15 U. S. C. § 1674(a). The Ninth Circuit, citing *Burke v. Compania Mexicana de Aviacion,* 433 F. 2d 1031 (9th Cir. 1970); *Common Cause v. Democratic National Committee,* 333 F. Supp. 803 (D. C. D. C. 1971); *Fagot v. Flinkote Co.,* 305 F. Supp. 407 (E. D. La. 1969); and *Willis v. Trans World Airways, Inc.,* 200 F. Supp. 360 (S. D. Cal. 1961), noted at the outset that private civil remedies for violations of federal statutes are regularly implied even when criminal sanctions and administrative enforcement are expressly authorized. The Court then considered and

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10. The Court stated at 52 P. 2d at 1177:

> "The statute, it will be seen, has a twofold purpose. One is to secure to the individual workman a minimum living wage, fixed by law, and the other is to penalize the employer who fails to pay the wage. With both purposes before us, we certainly think that it would be defeating the intent of the Legislature, so far as the first is concerned, if we were to hold that the very ones whom the law is intended to protect were helpless to secure that protection, and must satisfy themselves with knowing that somebody had gone to jail or paid a fine for violating the law. Such would, indeed, be a Pyrrhic victory for the workman, consoling perhaps to his feelings, but of very little value in giving to him what the law says he has earned and is due him.
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> * * *
>
> "We hold * * * that in view of the dual purposes of the law, it impliedly carries with it the common-law remedy which alone can insure that the class for whose aid it was adopted may be adequately protected in the right given by the law."

This decision was cited with approval in *Callaway v. Downing Co.,* 172 A. 2d 260 (Del. 1971).

rejected defendant's argument that because specific and limited civil remedies exist elsewhere in the Statute in question, the failure to provide for a remedy in Section 1674(a) demonstrates that Congress intended to exclude a private civil remedy for violation of § 1674. Thus the Ninth Circuit answers the identical argument made by the Bethlehem directors herein—that because there are specific limited private remedies provided for violations of Title III of the Act, it can be inferred that Congress intended no private remedy for violations of Title II including § 610:

> "Finally, Appellees assert that because specific and limited civil remedies exist in § 1640 of Subchapter I of the Act, the absence of a similar provision in Subchapter II shows the intent to exclude a private civil remedy for § 1674. In fact, they are urging this Court to apply the doctrine of *expressio unius est exclusio alterius*—the express authorization of a remedy in one section of a statute indicates that an omission of that remedy from other sections was intended by the legislature. While in the past some courts (including this one) have used this rule when denying implied actions under particular statutes, the rule has been criticized. Recently (as recognized by this court's holdings) the tendency is to limit the *expressio unius* rule in favor of construing an act so as to effectuate its dominant purpose.

However, in this case, neither the existence of alternative remedies under the same statute or under state law, nor the fact that enforcement of the federal statute is expressly vested in an administrative agency overcomes the need to imply

> a private right of action for § 1674(a) violations." 503 F. 2d at 111-112. [footnotes omitted]

The Court went on to reason:

> "Whatever may be the rule of 'adequacy' elsewhere, we believe that when there is no clear congressional intent contrary to the implication of private civil remedies, the adequacy of a statute's express remedies (or alternatively, the necessity of implied private ones) must be determined according to whether those express remedies ensure the *full* effectiveness of the congressional purpose underlying the statute. In this sense, when the statute in question seeks to protect an individual's interest, it is not enough for it to have some enforcement mechanisms: the initial question is whether the statute's protection might be enhanced by allowing private civil relief." 503 F. 2d at 112. [footnote omitted]

In *Stewart* the primary purpose of the statute was to protect against hardships and disruptions resulting from employee discharges due to garnishment of wages. 503 F. 2d at 113. Permitting private civil actions by those aggrieved for violations of the statute obviously effectuate the act's purpose. Similarly here, where the purpose of the statute is to control the influence corporations and labor unions can exert over elections and to prevent corporate funds from being used in elections without the consent of that corporation's stockholders, a private civil action is necessary for effectuation of the Congressional purpose.

The Bethlehem directors urge the Court to restrict the parties allowed to enforce the Act and the permissible remedies on the assumption that the constitutionality of § 610 is doubtful. Accepting the assumption for argument, the conclusion does not follow. Conferring a private cause of action has no bearing on the constitutionality of the Act. The issue of a private cause of action should not be decided on the basis of the mere spectre of constitutional issues.

For all of the above reasons, the implication of a cause of action for voters and stockholders is extremely appropriate.

D. Federal Election Campaign Act Amendments of 1974 Do Not Contradict the Third Circuit's Decision.

1. Subsequent Legislative History Should Not Be Considered.

In 1974, Congress amended the Federal Election Campaign Act by enacting the Federal Election Campaign Act Amendments of 1974, P. L. 93-443, 88 Stat. 1263. Petitioners contend that these amendments throw a "cross light" on congressional intent not to provide a private remedy under § 610.

Reference to subsequent legislative enactments or subsequent statements of legislative intent to substantiate a particular interpretation of a prior congressional enactment is of dubious value at best. Recently, in *Blanchette v. Connecticut General Insurance Corporation,* 95 S. Ct. 335 (1974), this Court specifically refused to resort to subsequent evidence of legislative intent and held that such evidence is not indicative of the legislative intent of Congress before the Act was passed:

"Finally, reliance is put on what is referred to as 'subsequent legislative history' in the form of statements by Congressmen during Oversight Hearings of the House Subcommittee on Transportation and Aeronautics on June 14, 1974, and on an *amicus* brief filed in this Court on behalf of 38 Congressmen. But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the act's passage. See, e.g., United States v. United Mine Workers of America, 330 U. S. 258, 282 (1947). Such statements 'represent only the personal views of these legislators, since the statements were . . . [made] after passage of the Act.' National Woodwork Manufacturers' Assn. v. NLRB, 386 U. S. 612, 639, no. 34 (1967) . . .'" 95 S. Ct. at 353.

In *United States v. United Mine Workers,* 330 U. S. 258 (1947) the Supreme Court was similarly asked to rely upon later expressions of Congressional intent made many years after the passage of the Norris-LaGuardia Act to ascertain the impact of that act on the jurisdiction of federal courts to issue injunctions in certain labor disputes. The court declined to entertain such testimony, stating, "We fail to see how the remarks of these senators in 1943 can serve to change the legislative intent of congress expressed in 1932 . . ."

The probative value of subsequent legislative enactments should be no greater than that accorded the post-passage statements of Congressmen regarding legislative intent. Actually, the Bethlehem directors have completely misunderstood the relevance of successive Congressional acts to the question of legislative intent. The proper inquiry is directed not forwards, but backwards:

> "There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments." *United States v. Congress of Industrial Organizations,* 335 U. S. 106, 112-113 (1948).

Moreover, looking forward is particularly inappropriate where, as here, the subsequent enactment establishes an entirely new remedial scheme, providing for the creation of a special federal regulatory agency to process certain violations of the Federal Election Campaign laws. The most that can be said is that such sweeping revision indicates Congressional dissatisfaction with the previous enforcement mechanisms of the Act. The 1974 Amendments cannot be interpreted, however, as having any bearing on Congressional intent at the time the 1971 act was passed.

2. Assuming, Arguendo, the 1974 Amendments to Federal Election Campaign Act and Debates Thereon Were Relevant, They Support Implication of a Private Right of Action Under 18 U. S. C. § 610.

The Federal Election Campaign Act Amendments of 1974 were, in part, a clear response to the inadequacy of the Justice Department as sole enforcement agency of § 610. Congressional sentiment in 1974 was entirely in accord with the Third Circuit's observation that:

> "The nature of the prohibited conduct further supports provision of private remedies. Contributions or expenditures to influence federal elections are prohibited; yet the politician whose election is

> facilitated by violation of § 610 may be in charge of the statute's enforcement. This possible conflict of interest is not simply hypothetical . . ." 496 F. 2d at 423. [A103]

Members of Congress put the matter more bluntly. Speaking in support of the 1974 Amendments, Senator Weicker said, at 120 Cong. Rec. (daily ed. April 1, 1974) S 4927:

> "Mr. President, we have seen the abuse, of governmental power in the FBI, the CIA, the military intelligence, and the various law enforcement agencies—the internal security of the Justice Department . . .
>
> • • •
>
> ". . . I am not going to be a party to giving the Government, with all of its power, additional power in this area, until the government can prove itself.
>
> "I feel much safer with the American people than I do with the government on any aspect of it.
>
> "I stated at the outset of my talk that in the participation of the American people in the democratic process lies our greatest safeguard against the abuses which occur within the political process."

As is clear from the provisions of the Amendments themselves, Congress intended by the 1974 Amendments to create a bipartisan Commission, apart from the executive branch, to have primary jurisdiction over enforcement of the Act. The six members are to serve for staggered terms of six years [§ 310(a)(2)]. Members are to be chosen on the basis of "their maturity, experience, integrity, *impartiality,* and good judgment and shall be chosen from among individuals who, at the time of their appointment, are not elected or appointed officers or employees in the *executive,* legislative or judicial branch of Government of the United States" [Emphasis supplied] [§ 310(a)(3)].

The 1974 Amendments expressly grant authority to citizens to bring complaints before the newly created Commission, which now has *primary* jurisdiction of such complaints [§ 314(2)(1)(A)]. While private actions in federal courts are not expressly authorized, they are clearly intended, conditioned upon exhaustion of new administrative remedies before the Commission. The *Joint Explanatory Statement of the Committee of Conference,* which reported the bill in final form, states:[11]

> ". . . First, the Commission is given power to bring civil actions in Federal district courts to enforce the provisions of the Act where its informal methods of obtaining compliance fail to correct violations. Second, the Commission is given *primary* jurisdiction for the enforcement of the provisions of the Act. Thus, any person *must exhaust* his administrative remedies with respect to violations under this Act."[12] [Emphasis supplied].

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11. "Federal Election Commission—Investigations and Hearings —Conference Substitute," House of Rep. Report No. 93-1438, p. 94.

12. This observation was restated almost verbatim with the addition of the word "first" by Congressman Brademas, speaking in favor of the Bill. 120 Cong. Rec. (Daily Ed., October 10, 1974) H 10328:

> "Mr. Speaker, it was the intent of the conferees that the Federal Election Commission have primary jurisdiction in all election law matters and that persons, individuals or organizations who may have complaints about possible violations *first* exhaust their administrative remedies with the Commission . . ."

The intent of Congress to allow continued private actions can also be inferred from the absence of an express prohibition in light of events from 1971 to 1974. Congress was well aware of the widely publicized private cases and the holdings of lower federal courts that a private cause of action was implied.[13]

The Bethlehem directors quote Congressman Wayne Hayes as construing the 1974 Amendments to preclude private actions because, in his view, they may be abusive. Congressman Hayes' views are contradicted by the Amendments themselves, the *Joint Explanatory Statement,* and the remarks of other Senators and Congressmen. This is a clear example of a Congressman attempting to recover by a speech what he lost in a bill.

Thus, even assuming subsequent legislative history were relevant, the legislative history of the 1974 Amendments to the Federal Election Compaign Act supports the conclusion that a private cause of action should be implied.

II. The Court of Appeals Was Correct in Holding That Summary Judgment Should Not Have Been Entered Against Plaintiff.

A. Introduction.

The Bethlehem directors are urging this Court to reinstate the District Court's order granting its motion for summary judgment. The District Court, without an opinion, granted defendants' motion, apparently on the grounds stated in its previous decision denying preliminary injunc-

13. *Ash v. Cort,* 496 F. 2d 416 (3d Cir. 1974); *Barber v. Gibbons,* 367 F. Supp. 1102 (E. D. Mo. 1973); *Common Cause v. Democratic National Committee,* 333 F. Supp. 803 (D. C. D. C. 1971); *Common Cause v. Finance Committee to Re-Elect the President,* D. C. D. C., Civ. Act. No. 1780-72; *Common Cause v. TRW,* D. C. D. C., Civ. Act. No. 980-72.

tion [A46] that there is no private cause of action pursuant to § 610 and that, even if there were such a private cause of action, defendants, on the facts presented herein, were nevertheless entitled to judgment as a matter of law. The Court reasoned that the meaning of "contribution or expenditure" in § 610 was governed by the definition of those terms in 18 U. S. C. § 691 (1970), as amended (Supp. II 1972); that § 591 requires a purpose to influence the nomination or election of a particular person; and that Bethlehem's advertisements and pamphlets were not designed to influence the election of any person. The Court of Appeals reversed the District Court, concluding that "since dispute exists as to a material factual issue, the district court erred in granting summary judgment and denying plaintiff's motion for an evidentiary hearing." 496 F. 2d at 425-426. The Court of Appeals correctly held that a private cause of action does lie for violations of Section 610; that plaintiff as a stockholder of Bethlehem and as a voter and citizen may assert such a claim; that a particular candidate's name need not be mentioned in order for a cause of action to be stated under § 610; and that factual issues remain to be decided. In addition, the Court noted the existence of plaintiff's state law allegations.

B. § 610 Does Not Require Naming the Candidate.

The District Court held that because the speech, advertisement and folder did not name a particular candidate, they therefore could not come within the prohibitions of § 610.

18 U. S. C. § 610 prohibits a corporation from making a "contribution or expenditure" in connection with federal elections. Section 591(f)(1) of the Act defines expenditure "when used in section . . . 610" as:

> ". . . a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . ., made for the purpose of influencing the nomination for election, or election, of any person to federal office."

In 1971, § 610 was amended so as to add the following definition of the phrase "contribution or expenditure":

> "Any direct or indirect payment . . . to any candidate, campaign committee or political party or organization."

This definition in § 610 supplements the § 591 definition.

The Courts have made it clear that "[t]he evil at which Congress has struck in § 313 (now 18 U. S. C. § 610) is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." *United States v. International Union United Auto Workers,* 352 U. S. 567, 589 (1957). The Third Circuit was correct in its observations that this evil is not lessened merely because no name is mentioned and that nothing in the language or legislative history supports an interpretation of §§ 591 and 610 that the particular candidate must be named in order for liability to attach. As the Court stated:

> "Nothing in the language or legislative history supports an interpretation of sections 591 and 610 that would make lawful an expenditure simply because in the communication it paid for no candidate was named. There is no evidence Congress thought the American public so unperceptive that it would recognize a statement as supporting or attacking a particular candidate only by use of his name; such a requirement would eviscerate § 610." 496 F. 2d at 425.

To require, as the directors urge, the naming of the particular candidate would provide would-be violators with another way of circumventing the clear command of the statute. A similar loophole was noted by Congress when it originally extended the meaning of contribution to include "expenditure" in 1947. Previously, the concept of "contribution" had been limited to direct gifts or direct payments. Addition of the term "expenditure" was thus considered necessary "(s)ince it was obvious that the statute as construed could easily be circumvented through indirect contributions . . ." *United States v. Congress of Industrial Organizations,* 335 U. S. 106 (1948). To adopt the narrow construction of § 610 favored by the directors would likewise circumvent the statute. Clearly partisan statements capable of only one interpretation, obviously referring to a particular candidate or party, would nevertheless escape prosecution merely because the particular candidate or party was not named; i.e., because the reference was indirect, rather than direct.

Here a review of the advertisement, speech, and folder, show the obvious partisan nature of the publication. Defendant Cort continually referred to "a prominent presidential candidate," "a potential presidential candidate," "one of the candidates," and attacked that candidate's views. Given the fact that in August and September, 1972, when this speech was reprinted and the advertisements appeared, there were only two presidential candidates, one being the incumbent President of the United States, only one individual could possibly or logically have been the target of these attacks—the candidate of the Democratic Party. Drawing an analogy from the law of defamation; it is well settled that one need not be named to be defamed.[14]

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14. Prosser, *On Torts,* 3rd edition, Defamation, § 106 (1965), at p. 767, states:

> "A publication may clearly be defamatory as to somebody, and yet on its face make no reference to the individual plaintiff.

As the Court of Appeals held, "the American public is [not] so unperceptive that it would [not] recognize a statement as supporting or attacking a particular candidate only by the use of his name." 496 F. 2d at 425.

C. Standards for Granting Summary Judgment.

The use and purpose of a motion for summary judgment was well stated by the Eighth Circuit in *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213, 219 (8th Cir. 1951):

> "A summary judgment is to be entered in a case if, but only if, the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances. Ramsouer v. Midland Valley R. Co., D. C. Ark., 44 F. Supp. 523, reversed on other grounds, 8 Cir., 135 F. 2d 101. A summary judgment is an extreme remedy, and, under the rule, should be awarded only when the truth is quite clear. American Insurance Company v. Gentile Brothers Company, 5 Cir., 109 F. 2d 732; Shultz v. Manufacturers & Traders Trust Company, D. C. N. Y., 1 F. R. D. 451; Drittel v. Friedman, D. C. N. Y., 60 F. Supp. 999; U. S. ex rel. Ryan v. Broderick, D. C. Kan., 59 F. Supp. 189. And all reasonable doubts touching the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment. Sarnoff v. Ciaglia, 3 Cir., 165 F. 2d 167."

This Court has stated that, on a motion for summary judgment, the evidence presented must be construed in favor of the non-moving party, who is to be given the benefit of all the reasonable doubts and inferences in determining whether a genuine issue exists as to a material fact. Moreover, the burden is on the moving party to establish the absence of any genuine issues as to material facts. *Adickes v. S. H. Kress and Company*, 398 U. S. 144 (1970). See also *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962); *Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F. 2d 114 (3d Cir. 1965); *Heyward v. Public Housing Administration*, 238 F. 2d 689, 696 (5th Cir. 1956).

In fact, summary judgment may not be granted unless the movant has shown that there is not "the slightest doubt

14. (Cont'd.)
In such a case, the plaintiff must sustain the burden of pleading and proof, by way of 'colloquium,' that the defamatory meaning attached to him. If he fails to do so, he has not made out his case. He need not, of course, be named, and the reference may be an indirect one, with the identification depending upon circumstances known to the hearers, and it is not necessary that every listener understand it, so long as there are some who reasonably do; but the understanding that the plaintiff is meant must be a reasonable one, and if it arises from extrinsic facts, it must be shown that these were known to those who heard."

as to a factual dispute." *Clausen and Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F. 2d 388, 389 (8th Cir. 1968); *Morrissey v. Proctor & Gamble Co.*, 379 F. 2d 675, 677 (1st Cir. 1967); *Brady v. Hearst Corp.*, 281 F. Supp. 637, 642 (D. Mass. 1968). Summary judgment may be granted only when the movant has shown his "right . . . to a judgment with such clarity as to leave no room for controversy, and . . . that plaintiff would not be entitled to recover under any discernible circumstances." *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213, 216 (8th Cir. 1951).

D. Material Factual Issues Remain Unresolved and for That Reason Summary Judgment Is Inappropriate.

1. Serious Dispute Exists as to Whether the Speech, Folder and Advertisement Are Expenditures or Contributions in Violation of Section 610.

The proper interpretation of "expenditure" is that adopted by this Court in the *International Union United Auto Workers* case, that is, that an expenditure does not come within the purview of the statute unless it is for an activity which constitutes "active electioneering." *United States v. International Union United Auto Workers, supra,* at 592. See also *United States v. Lewis Food Co.*, 366 F. 2d 710, 712 (9th Cir. 1966). Indeed, the alleged violations of § 610 present in both *International Union United Auto Workers* and *Lewis Food* are virtually identical to the allegations contained herein and are dispositive of this case.

In *Lewis,* the indictment charged, *inter alia,* that the defendant, Lewis Food, had paid an advertising agency to place an advertisement in various California newspapers concerning candidates for federal office. In *International Union United Auto Workers,* the defendant was charged with using union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in the 1954 election. In both instances, the District Courts had dismissed the indictments; on appeal, both rulings were overturned.

In *International Union United Auto Workers,* the Supreme Court stated:

> "To deny that such activity, either on the part of a corporation or a labor organization, constituted an "expenditure in connection with any [federal] election" is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital. More particularly, this Court would have to ignore the history of the statute from the time it was first made applicable to labor organizations. As indicated by the reports of the Congressional Committees that investigated campaign expenditures, it was to embrace precisely the kind of indirect contribution alleged in the indictment that Congress amended § 313 to proscribe 'expenditures.'" 352 U. S. at 585.

Moreover, both of these cases recognize that whether or not such an advertisement as that involved in this case constitutes a violation of the Act is clearly a question of fact for the jury:

> "We agree with the government, however, that a jury question was presented as to whether the advertisement in this case . . . was designed to influence the public at large to vote for or against particular candidates." 366 F. 2d at 712 (*U. S. v. Lewis Food*).

In addition, Senator Taft repeatedly recognized in the debate on § 304, that prosecutions under the Act may present difficult questions of fact. See 352 U. S. 585-587, n. 1. Examples of such factual questions might include:

> The broadcast (advertisement) paid for out of the general dues (funds) of the union (corporation) membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union (corporation) sponsor the broadcast (advertisement) with the intent to affect the results of the election? *International Union United Auto Workers, supra* at 592.

Finally, a portion of the Senate debate preceding the passage of the Taft-Hartley Act, 29 U. S. C. A. § 141, et seq., had direct bearing on the problem presented in this case:

> "Mr. Pepper. . . . Suppose that in the 1948 campaign, Mr. William Green, as president of the American Federation of Labor, should believe it to be in the interest of his membership to go on the radio and support one party or the other in the national election, and should use American Federation of Labor funds to pay for the radio time. Would that be an expenditure which is forbidden to a labor organization under the statute?
>
> "Mr. Taft. Yes." 93 Cong. Rec. 6439.

Thus for the purpose of ruling on the summary judgment motion and since no discovery has been permitted in this case, the Court was bound to accept as true the plaintiff's allegations and their fair inferences, including the following facts: that at some time in 1971 or 1972 defendants entered into a plan which had as its ultimate purpose to influence the United States electorate to help bring about a Republican Party victory in the 1972 Presidential election and which plan involved the utilization of Bethlehem's resources and the expenditure of its funds [First Amended Complaint, paragraphs No. 13, 14, 15, A72-A73]; that in furtherance of said plan and purpose, defendants caused corporate resources, including the expenditure of substantial funds in excess of $500,000 to be utilized in connection with the political campaign [First Amended Complaint, paragraphs Nos. 15, 20, A73-A74], including causing an advertisement to run nationally at corporate expense, which was blatantly partisan on its face [First Amended Complaint, paragraphs No. 15, 16, 19, A73-A74]. Since these allegations clearly state that defendants planned and did use corporate funds in connection with the 1972 campaign for the purpose of influencing its outcome, there can be no question that the First Amended Complaint states a violation of 18 U. S. C. Section 610, by defendants.

2. Plaintiff's Complaint Alleges Other Illegal Expenditures in Addition to the Speech, Advertisement and Folder.

The First Amended Complaint alleges that defendants entered into a course of conduct in violation of the Act which included not only distribution and publication of the advertisement, speech, and folder, but also the expenditure of corporate funds in connection with the 1972 Presidential election. Plaintiff's First Amended Complaint states:

> "13. At some time in 1971 or 1972, defendants entered into a plan involving the utilization of Bethlehem Steel's resources, including the ex-

penditure of its funds, in connection with the 1972 United States presidential election.

14. The ultimate purpose of said plan was to influence the United States electorate to help bring about a Republican Party victory in said election. This purpose was solely in furtherance of the individual interests and beliefs of defendants and was in violation of state and federal law, and in derogation of the rights of the United States public, and of the approximate one half of the shareholders of Bethlehem Steel that are registered members of the Democratic political party.

15. Thereafter, in furtherance of said plan and purpose, defendants caused, and continue to cause, corporate resources to be utilized, including the expenditure of substantial funds in connection with said political campaign, including, inter alia, their causing to be prepared and disseminated at corporate expense, an advertisement entitled "I Say Let's Keep the Campaign Honest. Mobilize 'Truth Squads' . . .", attributed to defendant Cort. [A72-A73]

It is clear, therefore, that even if the advertisement, speech, and folder at issue were not in violation of the Act, plaintiff has nevertheless alleged separate and substantial violations in the expenditure of Bethlehem funds to influence the last presidential election. "Utilization of . . . resources," as used in the First Amended Complaint, includes both contributions and expenditures of funds, services of employees, and use of property. A jury trial has been demanded. Summary judgment obviously is inappropriate under these circumstances.

E. Plaintiff's Complaint States a Valid Cause of Action Cognizable in Federal Court.

It has long been established that a stockholder may maintain an action in equity for injunctive relief and damages arising out of *ultra vires* expenditures of corporate funds by the directors. *Dodge v. Woolsey,* 18 How. 331 (1855). This is particularly true under Delaware law, the state of incorporation of Bethlehem. *Toebelman v. Missouri Kansas Pipe Line,* 130 F. 2d 1016 (3d Cir. 1942); *Steinberg v. Adams,* 90 F. Supp. 604 (S. D. N. Y. 1950); *Keenen v. Eshleman,* Del. Ct. 1938, 2 A. 2d 904. See also *Abrams v. Allen,* 297 N. Y. 52, 74 N. E. 2d 305 (1947); Fletcher, *Cyclopedia of the Law of Corporations,* Vol. 13, 1970, revised volume, Chapter 58, § 5915.1, 5928 pp. 298-299, 316. This principal applies to unlawful political expenditures. *Lustwerk v. Lytron, Inc.,* 344 Mass. 647, 18 N. E. 2d 871 (1962). *Schwartz v. Romnes,* 357 F. Supp. 30 (S. D. N. Y. 1973), *rev'd on other grounds* 495 F. 2d 844 (2d Cir. 1974) *Miller v. A. T. T.,* No. 73-2007 (3d Cir. 1974). Actions carried out in violation of federal law by Delaware corporations are *ultra vires.* Delaware Code Annotated, Title 8, Section 101; 122(6) Fletcher, *supra,* Vol. 6, 1968 revised Vol. Chapter 24, § 2491, p. 335.[15]

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15. The relevant provisions of Delaware law state:

"SUBCHAPTER I. FORMATION.

"§ 101. Incorporators; purposes of corporation

"Any number of persons, not less than three, may establish a corporation for the *transaction of any lawful business,* or to promote or conduct any legitimate objects or purposes under the provisions of and subject to the requirements of this chapter, . . ."

Delaware Code Annotated, Title 8, Section 101. (Emphasis supplied).

As stated in *Fletcher, supra,* Vol. 6, 1968 revised vol., Chapter 58, page 335:

"§ 2491. Restriction of powers to acts not illegal or against public policy.

The First Amended Complaint states a claim for relief under 28 U. S. C. § 1331. The essence of this claim is that the directors entered into a plan resulting in the utilization of Bethlehem's resources, including the expenditure of its funds in connection with the 1972 United States Presidential election for the purpose of bringing about a Republican Party victory in violation of 18 U. S. C. § 610 (First

15. (Cont'd.)

"The words 'any lawful purpose' commonly found in the statutes impose a limitation upon the powers of the corporation enumerated in its articles of incorporation, however broad such powers may be, and in effect prohibit their exercise in such a way as to violate the statutes of the United States or of any state in which the corporation may do business."

A federal court, in interpreting a similar provision under New Jersey law, that "three or more persons may avail themselves of the provisions of the act and become a corporation for any lawful purpose," stated:

"This language is not merely perfunctory. It means, obviously, that, whatever powers the incorporators saw fit to assume, they must hold and exercise for the accomplishment of lawful objects. The words in question operate, therefore, as a limitation upon all the powers enumerated in the articles of association which were filed by the promoters of the Securities Company, so that, however, extensive and comprehensive these powers may seem to be, the state of New Jersey has said, 'You shall not exercise them so as to set at defiance any statute lawfully enacted by the Congress of the United States, or any statute lawfully enacted by any state wherein you see fit to exercise your powers."

United States v. Northern Securities Co., 120 F. 721, 727 (Circuit Ct. D. Minn., 3rd Div. 1903), *affirmed, Northern Securities v. United States*, 193 U. S. 197 (1903).

Delaware law provides further support for the proposition that it is beyond the scope of the grant of authority to cause the corporation to act in violation of federal law.

"§ 122. Specific powers.

"Every corporation created under the provisions of this chapter shall have power to—

* * *

"(6) Make by-laws not inconsistent with the *Constitution or laws of the United States*. . . ."

Delaware Code Annotated, Chapter 8, Section 122. (Emphasis supplied).

Amended Complaint, paragraphs 13, 14, 15, 17, 20, A72-74). Such unlawful expenditure by defendants gives rise to a cause of action under Delaware law. This cause of action arises under the laws of the United States within the meaning of 28 U. S. C. § 1331 since it is bottomed on the violation of 18 U. S. C. § 610. There is thus a ground for cognizance of this claim in federal court independent of the implication of any federal right of action.

This Court's decision in *Smith v. Kansas City Title Co.*, 255 U. S. 180 (1920) is directly on point. There, a stockholder brought a derivative action on behalf of a Missouri banking corporation to enjoin it from investing in certain United States Government instrumentalities which were alleged to be unlawfully issued in violation of the Constitution of the United States. Such an investment was alleged to be *ultra vires* under Missouri law in that the bank was prohibited from investing in bonds "not authorized to be issued by a valid law." *Smith v. Kansas City Title and Trust, supra,* at pp. 197-198.

There was no diversity of citizenship and the court found federal question jurisdiction on the basis that the averments of the bill drew directly into issue the constitutional validity of an act of Congress. The Court stated in reaching this conclusion:

> "The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent

that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

"The general allegations as to the interest of the shareholder, and his right to have an injunction to prevent the purchase of the alleged unconstitutional securities by misapplication of the funds of the corporation, give jurisdiction under the principles settled in Pollock v. Farmers' Loan & Trust Co., and Brushaber v. Union Pacific R. R. Co., supra. We are, therefore, of the opinion that the District Court had jurisdiction under the averments of the bill, and that a direct appeal to this court upon constitutional grounds is authorized." 255 U. S. at 201-202.

Section 1331 equally includes cases arising under the Constitution or the laws of the United States. Thus, here, since the state claim is dependent on whether or not the acts complained of are violative of 18 U. S. C. §610, the interpretation of this federal statute is directly in issue.

Justice Brennan analyzed the current judicial understanding of *Smith* in *Wheeldin v. Wheeler*, 373 U. S. 647, 659-60 (1963):

"The second possible theory builds from Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 57. A shareholder sued to enjoin the Trust Company, a Missouri corporation, from investing in certain federal bonds, on the ground that the Act of Congress authorizing their issuance was unconstitutional. It was claimed that under Missouri law an investment in securities the issuance of which had not been authorized by a valid law was ultra vires and enjoinable. The cause of action, thus, was state-created. Nevertheless this Court held that the action was one arising under federal law within the meaning of the predecessor section to 28 U. S. C. § 1331(a). See also Fielding v. Allen, 2 Cir. 181 F. 2d 163. It has been suggested that later decisions, e.g., Puerto Rico v. Russell & Co., 288 U. S. 476, 53 S. Ct. 447, 77 L. Ed. 903; Gully v. First Nat. Bank, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 90, repudiated Smith. London, 'Federal Question' Jurisdiction—A Snare and a Delusion, 57 Mich. L. Rev. 835, 853 (1959). But those decisions are clearly distinguishable as attempts to found federal jurisdiction upon 'remote federal premises, or mere federal permission . . ., or other merely possible federal defenses.' Hart and Wechsler, The Federal Courts and the Federal System (1953), 769. *Smith remains firm authority for the principle that 'where federal law has inserted itself into the texture of state law, a claim founded on the national legislation could be brought into a federal forum' even if the right of action was state-created.* Mishkin, The Federal 'Question' in the District Courts, 53 Col. L. Rev. 157, 166 (1953). Stated differently, 'in the Smith case the claim under federal law was an essential ingredient of the plaintiff's case, without which he could assert no right to relief.' Hart and Wechsler, supra, at 766. *In short, there is federal-question jurisdiction if a proposition of federal law is inherent in the plaintiff's claim.* Cf. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216, 225 (1948)."

[Dissenting opinion, emphasis supplied]

Substantial policy considerations dictate that this action be heard in a federal forum. These are:

1. The federal law aspects of the cause are complex and novel, invoking questions of statutory construction and constitutionality. In contradistinction, the state law aspects involve, in the main, ancient and well-developed theories of corporate law and director responsibility. On balance of the competing judicial interests, a federal forum is therefore more appropriate;

2. The federal statute brought into issue arises out of Congressional concern about the purity of the federal elective processes. It is for the purpose of regulating conduct in a manner designed to maintain the integrity of these processes. Where Congress has enacted legislation expressing such national policies, it is both appropriate and consistent with the "arising under" grant of judicial power under Article III to provide a "federal judicial haven" to protect such legislation from uninformed or hostile alternative tribunals. "The Federal 'Question' in the District Courts", 53 Col. L. Rev. 157, 195, 196 (1953). On this point, Professor Mishkin states at 196:

> "The use of the federal trial courts to protect a congressional program seems no less meet than their use to vindicate a specific federal right. In either area the national concern and policy are first established by congressional action. The balancing of competing values is not left to the predilections of each individual federal—rather than state—court, but is declared, at least generally, by Congress. The protective forum in such circumstances is then, principally, a shield for federal legislation. In a very real sense do all such cases 'arise *under*' the laws establishing the congressional plan, within the meaning of Article III." [emphasis in original].

This concept of "arising under" is consistent with the decision in *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661 (1973). That case was recognized as not involving a "garden-variety ejectment claim" on the basis that the "Federal Government has shown a continuing solicitude for the rights of the Indians in their land." Justice Rehnquist concurring at 684. In *Oneida,* the recognition of this fundamental governmental policy underlying the claim asserted led to the conclusion that a claim for relief under Section 1331 had been stated. Underlying the claim at bar is legislation expressing the government's longstanding concern about the utilization of corporate and union resources in connection with federal elections. We submit that the same considerations that led to the decision in *Oneida* compel a similar conclusion here.

Respondent's statement of claim fairly sets forth the factual framework supporting the state law basis for relief in accordance with the requisites of Rule 8 F. R. Civ. P. Consistent with the principles of modern federal pleading, courts may take judicial notice of theories of law not specifically pleaded that support a cause of action under the claim alleged. *United States v. Provident National Bank,* 259 F. Supp. 373 (E. D. Pa. 1966) and authorities cited therein. This fundamental principle was recognized under stricter prior pleading practices even in instances where an incorrect legal theory to support the claim was pleaded. *Missouri K. & T. R. Co. v. Wulf,* 226 U. S. 570 (1913). Moreover the First Amended Complaint [A72, para. 14] clearly sets forth reliance on state as well as federal law, as noted by the Third Circuit. 496 F. 2d at 419 (note 1) [A95].

Accordingly, since plaintiff's complaint states a valid cause of action pursuant to Delaware law and this cause of action can be heard by the federal courts, the District Court's grant of summary judgment was clearly erroneous and the resultant reversal by the Court of Appeals eminently correct.

III. 18 U. S. C. § 610 as Sought to Be Enforced Is Not Violative of the United States Constitution.

A. It Is Inappropriate for the Court to Reach This Constitutional Issue on a Barren Record.

In a closely similar situation to that at bar, *United States v. International Union United Automobile Workers,* 352 U. S. 567 (1957), the Supreme Court considered the propriety of a criminal indictment brought under 18 U. S. C. § 610, which alleged that the appellees had used union dues to sponsor commercial television broadcasts designed to influence the electorate to elect certain candidates for Congress in connection with the 1954 election. The appellee raised in defense the argument that the statute as applied was violative of First Amendment rights under the United States Constitution.

The Court, in upholding the indictment, remanded the case for trial, refusing to decide whether the statute as applied to the activities in question was unconstitutional without the benefit of a full trial record. The Court stated on this point:

> ". . . only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative processes especially demanded for constitutional decision." 352 U. S. at 591.

It would similarly be inappropriate to reach a constitutional determination on the meager record in this case.

This position was taken by the Court of Appeals in the case at bar. 496 F. 2d at 425-26 [A108]. The court held that § 610 applies only to partisan communications, and therefore the constitutional issue was not ripe for decision until the factual issue of whether the communications at issue were partisan, and therefore in violation of § 610, was decided. The Court recognized that:

> ". . . the district court has never passed on these contentions and that they may be reasserted on remand." 496 F. 2d at 426. [A108]

Until it is determined whether the Bethlehem directors violated § 610 this court should not decide if § 610 is unconstitutional. No constitutional decision should be reached unless the issue is unavoidable. *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 347 (1936); *Wilshine Oil Co. v. United States,* 295 U. S. 100 (1935); *Light v. United States,* 220 U. S. 523, 538 (1911); *Siler v. Louisville & Nashville R. Co.,* 213 U. S. 175, 191 (1909); *Burton v. United States,* 196 U. S. 283, 295 (1905).

B. Corporations, as Fictional Legal Entities, Have Been Denied Other Constitutional Privileges Which Natural Persons Enjoy. Therefore, There Is No Reason to Assume That Corporations Are Fully Protected by the First Amendment.

Corporations have not been granted constitutional rights and guarantees to the same extent as natural persons. For example, although corporations have been conceded the right to equal protection of the laws, *Connecticut General Life Ins. Co. v. Johnson,* 303 U. S. 77 (1938); *Louis K. Liggett Co. v. Lee,* 288 U. S. 517 (1933), they are denied the privileges and immunities of citizens of the United States. *Hague v. Congress of Industrial Organizations,* 307 U. S.

496 (1939); *Orient Insurance Company v. Daggs,* 172 U. S. 557 (1899). Corporations also have been denied the Fifth Amendment privilege against self-incrimination. *Oklahoma Press Pub. Co. v. Walling,* 327 U. S. 186 (1946); *Essgee Co. of China v. United States,* 262 U. S. 151 (1923); *Hale v. Henkel,* 201 U. S. 43 (1906).

The Bethlehem directors contend, however, that the language of the First Amendment must be read to prohibit the regulation by Congress of corporate campaign contributions. Fortunately, this overly simplistic view of the First Amendment has never been adopted by this Court. Indeed, this Court has expressly rejected the proposition that the First Amendment is an absolute and inflexible protection of all speech, regardless of source, and has never held that corporations *per se* have First Amendment rights.

In *Wilson v. United States,* 221 U. S. 361 (1911), this Court noted that the status of a corporation is a privilege granted by the State and entered into voluntarily by individuals "whose association has the advantage of corporate organization." *Id.* at 382. The privileges granted pursuant to corporate organization "raise a distinction" between individuals and corporations so as to justify precluding the corporation from certain constitutional rights. Thus the Court denied the corporation the privilege against self-incrimination.

The above principle was further defined in *United States v. White,* 322 U. S. 694 (1944), in which the Court held:

> "The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. . . . The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual and civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations." 322 U. S. at 700.

The Court in *White* stressed that a corporation represents interests which go beyond the personal interests of its members and that a corporation embodies a unique group interest. The Court held that the constitutional privilege against self-incrimination is an individual civil liberty and could not be claimed by a corporation to protect its corporate interests.

Modern corporations such as Bethlehem, because they represent massive conglomerations of wealth, could dilute or destroy the constitutional rights of ordinary citizens if allowed to contribute to political campaigns without regulation. Moreover, the purely corporate ends served when corporations contribute to political campaigns may trample on the constitutional rights of the very individuals who are stockholders of that corporation. See the concurring opinion of Justice Douglas in *International Association of Machinists v. Street,* 367 U. S. 740 (1961). Those who framed the constitution could not have intended that the First Amendment guarantees of freedom of speech should be manipulated by enormous and powerful corporations to serve purely corporate purposes, even at the expense of the rights of individual citizens.

The above approach was taken in the first case to ever rule directly on the constitutionality of the statute in ques-

tion. In *United States v. United States Brewers' Assn.*, 239 Fed. 163 (W. D. Pa. 1916), ruling on the statutory predecessor to § 610, the Court found:

> "In the exercise of its prerogatives and to secure greater economy and efficiency, the government has thought best that certain artificial bodies should be created with certain fixed and definite powers, and acting within certain prescribed limitations. These artificial creatures are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed.
>
> • • •
>
> And when we reflect that Congress is here dealing with elections at which Representatives in Congress are being voted for; that an election is intended to be the free and untrammeled choice of the electors; that any interference with the right of the elector to make up his mind how he will vote is as much an interference with his right to vote as if prevented from depositing his ballot; that the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election; that any law the purpose of which is to enable a free and intelligent choice, and an untrammeled expression of that choice in the ballot box, is a regulation of the manner of holding the election—the power of Congress to prohibit corporations of the state from making money contributions in connection with any such election appears to follow as a natural and necessary consequence." 239 at 168-69.

The 1971 amendment to § 610 makes explicit the right to utilize corporate funds to communicate with stockholders for any purpose, including to solicit voluntary contributions for political action committees. The amendment expressly permits stockholders to contribute to such committees and allows the use of funds thus raised to support political candidates. However, the amendment permits and presupposes that the committees will be controlled by directors or their designees. The directors have a significant advantage over ordinary stockholders and members of the public. They may use corporate funds without limitation to seek contributions. Thus, a particular candidate could be funded by a corporate "political action committee" even though a large majority of the stockholders opposed his candidacy. Moreover the directors retain full individual rights to expend their personal funds and speak out in support of candidates as they see fit.

The 1971 amendment fully responds to the hypothetical reservations of Justice Rutledge in his concurring opinion in *United States v. Congress of Industrial Organizations*, 335 U. S. 106 (1948) (if the Act prohibited stockholder communications, it would raise constitutional doubts); and, the Bethlehem directors' reliance on this case is misplaced. As the Court noted in *Pipefitters Local Union No. 562 v. United States*, 407 U. S. 385 (1972), the purpose of the 1971 amendment was to codify judicial comments on § 610.

The directors cite cases in which the Court has held certain activities of corporations to be within the protection of the First Amendment. Significantly, these cases all involve media, which happen to exist in corporate form. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) (involving distribution of newspapers); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952) and *Kingsley Int'l. Pictures*

v. Regents of the University of New York, 360 U. S. 684 (1959) (involving movie censorship); *New York Times Co. v. Sullivan,* 376 U. S. 254 (1964) (a newspaper); and *Time, Inc. v. Hill,* 385 U. S. 374 (1967) (a newsmagazine). These cases do not establish First Amendment rights of corporations *per se* but merely that natural persons retain their First Amendment rights even though they publish their views under corporate auspices. The holdings of the Court did not deal with the rights of dissenting stockholders as they were not involved in the controversies. All the corporations were members of the press whose corporate form was incidental, and they came before the Court with the presumption that their *raison d'etre* was the dissemination of information and ideas. Bethlehem, by contrast, is the second largest producer of steel in the United States [A28]. The directors cannot rely on the media cases for an unbridled right to utilize stockholders' capital, contributed for the purpose of making steel, in pursuit of their personal political objectives, so long as the use is within a broad definition of speech.

For the above reasons, the Court should reject the contention that corporations *per se* have rights under the First Amendment and hold that protections accorded certain corporate activities are based on the rights of natural persons.

C. Assuming Arguendo That Bethlehem Enjoys Full Protection of the First Amendment, 18 U. S. C. § 610 Is Constitutional.

It is established beyond question that First Amendment freedoms may be limited if the government demonstrates reasons or interests which are "compelling," *NAACP v. Button,* 371 U. S. 415, 438 (1963); "substantial,"

NAACP v. Alabama, 357 U. S. 449, 464 (1958); "subordinating", *Bates v. City of Little Rock,* 361 U. S. 516, 524 (1960).

Such a reason and interest is found in Article I, Section 4 of the Constitution, granting Congress the power to regulate elections. The Court's language in *United States v. International Union United Auto Workers,* 352 U. S. 567 (1957), interpreting § 610, emphasizes the compelling nature of the sound governmental interest in protecting the democratic electoral process. The Court found that Congress had a valid interest in preventing "the corroding effect of money employed in elections by aggregated power" 352 U. S. at 582. The Court continued, "Speaking broadly, what is involved here is the integrity of our electoral process, and not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society." 352 U. S. at 570.

Many cases have also recognized the compelling interest of preventing corruption in the electoral process:

> "That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election [of the President] from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.
>
> If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it *must have the power to protect the election on which its existence depends from violence and corruption.*

If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." [emphasis supplied] *"Ku-Klux Cases"*, 110 U. S. 651, 657-658 (1884) [emphasis added].

"The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. . . . The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to *safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.* Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." [emphasis supplied] *Burroughs v. United States,* 290 U. S. 534, 544-545 (1934) [emphasis added].

"It cannot be doubted that these comprehensive words [of Article I of the Constitution which grant congress power to regulate the 'times, places, and manner' of holding Congressional elections] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm,* 285 U. S. 355, 366 (1932). See also *Ex parte Siebold* 100 U. S. 371, 387 (1880).

In *United Public Workers of America v. Mitchell,* 330 U. S. 75 (1947), the Court upheld 28 U. S. C. § 380(a), § 9(a) of the Hatch Act forbidding federal employees from taking an active part in political management or campaigns. The statute had been attacked on the grounds that it violated the federal employee's First Amendment freedom of expression. Yet the Court realized that First Amendment rights are not absolute and must give way to an overriding public interest:

"To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system. Congress is not politically naive or regardless of public welfare or that of the employees. It [the Hatch Act] leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests as before the passage of the Act . . . Congress may regulate the political conduct of government employees 'within reasonable limits' even though the

> regulation trenches to some extent upon unfettered political action." 330 U. S. at 99-102.

Similarly here, 18 U. S. C. § 610 is narrowly drawn. Specific exemptions are incorporated within it including, *inter alia,* voluntary political action funds. Corporate funds may be used to communicate with stockholders for any purpose including requests for contributions to support political candidates. Any doubts as to the constitutionality of § 610 which may have been raised by the concurring opinion in *United States v. Congress of Industrial Organizations,* 335 U. S. 106 (1948) are thus resolved.

The Court has recently affirmed *Mitchell,* further buttressing the soundness of that ruling on First Amendment rights. In *U. S. Civil Service Commission v. National Assn. of Letter Carriers,* 413 U. S. 548 (1973) the Court held that:

> "Neither the right to associate nor the right to participate in political activities is absolute in any event. See, e.g. Rosario v. Rockefeller, 410 U. S. 752 (1973); Dunn v. Blumstein, 405 U. S. 330, 336 (1972); Bullock v. Carter, 405 U. S. 134, 140-141 (1972); Jenness v. Fortson, 403 U. S. 431 (1971); Williams v. Rhodes, 393 U. S. 23, 30-31 (1969). Nor are the management, financing and conduct of political campaigns wholly free from government regulation. We agree with the basic holding of Mitchell that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited. Until now this has been the judgment of the lower federal courts, and we do not understand the District Court in this case to have questioned the constitutionality of a law that was specifically limited to prohibiting the conduct in which Mr. Poole in the Mitchell case admittedly engaged." 413 U. S. at 567.

As the cost of campaigning skyrockets, the danger envisioned by Congress increases proportionately. If not restricted, corporations would have the ability to dictate who holds elective offices and what their positions on legislation and enforcement of laws will be. This power is mainly due to the unique corporate ability to aggregate capital which is in part a result of privileges granted to corporations by the government.

In addition to the compelling interest in preventing corruption, Congress also has a correlative positive interest in ensuring that political viewpoints other than those advanced by corporations are not overwhelmed. The Federal Election Campaign Act of 1971 allowing corporate contributions and expenditures which are financed by voluntary donations from a separate fund does no more than regulate the *manner* in which a corporation's expression may be exercised. This type of regulation has been approved by the Court in several cases, summarized in *California v. LaRue,* 409 U. S. 109, 117 n. 4 (1972) in which the Court said:

> ". . . States may validly limit the manner in which the First Amendment freedoms are exercised by forbidding sound trucks in residential neighborhoods, Kovacs v. Cooper, 336 U. S. 77 . . . (1949) and may enforce a nondiscriminatory requirement that those who would parade on a public thoroughfare must first obtain a permit. Cox v. New Hampshire, 312 U. S. 569 (1941). Other state limitations on the 'time, manner and place' of the exercise of First Amendment rights have been sustained. See, e.g., Cameron v. Johnson,

390 U. S. 611 (1968), and Cox v. Louisiana, 379 U. S. 559 (1965)."

In *International Association of Machinists v. Street*, 367 U. S. 740 (1961), Justice Douglas, in his concurring opinion, made the pertinent observation that the application of union funds to political purposes may violate the First Amendment rights of the members of the union in that they are in effect being forced to support financially ideas with which they may disagree. The same reasoning is applicable to stockholders in a corporation. The cases cited above would also support the right and responsibility of Congress to ensure that the voices of individual citizens are not drowned out by money-amplified corporate expression.

The Court has implied in *Pipefitters Local Union No. 562 v. United States*, 407 U. S. 385 (1971), that Congress has achieved the proper balance required in order to prevent corruption of the electoral process and to protect the First Amendment rights of individuals. Referring to Congressman Hansen's statement of the purpose of the 1971 amendment to § 610, the Court stated:

> "At the present time [Hansen summarized] there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote, and to make political contributions and expenditures financed by voluntary donations which have been kept in a separated segregated fund. This amendment writes that balance into clear and unequivocal statutory language." 407 U. S. at 431.

Lower federal courts are unanimous in finding § 610 constitutional. In *United States v. Pipefitters Local Union No. 562*, 434 F. 2d 1116, 1123 (8th Cir. 1970), *revs'd in part on other grounds sub nom., Pipefitters Local Union No. 562 v. United States, supra*, the Court held:

> "[Section 610] does not go beyond protecting the valid governmental interest and infringe unnecessarily on constitutional rights. Separate voluntary political associations by union members are not in any way proscribed by the statute. Therefore Section 610 is not unconstitutional under the First Amendment."

In *United States v. Boyle*, 338 F. Supp. 1028, 1032 (D. C. D. C. 1972), the Court stated:

> "The Court finds the statute is sufficiently narrow on its face and in its application so that it does not unnecessarily infringe on constitutional rights beyond those where the government has demonstrated a compelling interest in regulating."

Moreover, the Court in *Boyle* was clear in holding that § 610 was not unconstitutionally vague. 338 F. Supp. at 1034. In affirming, the Court of Appeals, in *United States v. Boyle*, 482 F. 2d 755, 763-64, held that the statute was constitutional and observed that, if a union could expend "involuntary" funds upon the vote of a majority of its members, minority interests would be endangered. The

court was persuaded by the fact that unions, like corporations, can establish voluntary political action committees which can be funded by members authorized payroll deductions. Similarly, here each interested Bethlehem stockholder could authorize the amount of his choice to be deducted from his quarterly dividend payment.

In *Schwartz v. Romnes,* 357 F. Supp. 30 (S. D. N. Y. 1973), *rev'd on other grounds,* 495 F. 2d 844 (2d Cir. 1974), the district court held that the New York legislature, in enacting a state prohibition on corporate expenditures, had sought to prevent corporate officials from devoting the assets of a corporation to political causes with which stockholders might not agree. The Court held, "These overriding governmental interests are sufficient to justify the regulation of the corporate participation in electioneering efforts."

Limitations on corporate spending have been held constitutional by at least one high state court. In *People v. Gansley,* 191 Mich. 357, 158 N. E. 195 (1916), the Supreme Court of Michigan considered a state statute prohibiting political expenditures by corporations:

> "We are dealing here with a statute relating to elections, and the exercise of the police power of the state. In Cooley on Constitutional Law (7th Ed.) 907, it is said:
>
> 'All such reasonable regulations of the constitutional right which seem to the Legislature important to the preservation of order in elections, to guard against fraud, undue influence and oppression, and to preserve the purity of the ballot box, are not only within the constitutional power of the Legislature, but are commendable and at least some of them absolutely essential.'

The court further stated:

> "The individual activities of the officers of the corporations are not prohibited. They may freely speak, write and publish their views as provided for in the last clause of Section 3 [of the Michigan statute] . . . the corporation is not embraced within the provisions of section 4, article 2, of the State Constitution. That section, in our opinion, relates to natural and not artificial persons, as does also the Fourteenth Amendment of the federal Constitution, in protecting the privileges and immunities of citizens from being abridged. Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520 and cases cited."

For these reasons, it is respectfully submitted that 18 U. S. C. § 610 does not violate the First Amendment to the Constitution of the United States.

D. 18 U. S. C. § 610 Is Not Violative of the Fifth Amendment.

18 U. S. C. § 610 does not create a "suspect classification" such as, for example, a racial classification. Accordingly, it cannot be held to violate the due process clause unless no rational basis for the statute may be discerned. *McGowan v. Maryland,* 355 U. S. 420, 426 (1961). It is the task of Congress, not the courts, to weigh the interests to be protected and decide what regulation is reasonably designed to accomplish constitutional objectives. *Williamson v. Lee Optical of Oklahoma,* 348 U. S. 483 (1955).

The prohibition on expenditures from the general treasury of corporations to influence elections is reasonable. Corporations are granted rights by statute denied to indi-

viduals, partnerships and unincorporated associations to foster the accumulation of capital necessary for industrial enterprise. Such rights include: limited liability of the stockholders; an indefinite existence; exemption from the rule against perpetuities; favorable income tax treatment; exemptions from estate and inheritance taxes; and the right of the majority to retain capital and earnings in the corporate treasury if they can mae a minimal showing of business purpose. Corporations thereby have the ability to issue securities, and undertake projects and lines of business that would be infeasible for other entities such as partnerships or unincorporated associations. *Ballantine On Corporations,* 67 (1946), has observed that the chief source of the early opposition to the existence of corporations in America was due to the fear that the corporation, whose foremost object in incorporating "was to gain special privileges not enjoyed by other citizens . . . would infringe on the 'natural rights' of citizens."

In passing 18 U. S. C. § 610, Congress recognized that corporations, in part because of the special privileges granted them, are able to accumulate vast wealth. If left unregulated, corporations could throw the electoral process into serious unbalance. Such is the considered judgment of Congress, and that judgment may not be questioned by the judiciary. *Williamson v. Lee Optical of Oklahoma, supra.*

The provisions of § 610 recognize that the right to participate in and vote in elections was granted to natural persons but not to fictitious entities such as corporations. The provisions for use of the general corporate treasury to solicit from stockholders a political action fund is more than an adequate concession to the rights of corporations, and an effective safeguard of their interests. Moreover, the directors' asserted right to spend funds from the general corporate treasury, if granted, would unfairly discriminate

in favor of the directors and against dissenting stockholders and the public generally.

For these reasons, it is respectfully submitted that 18 U. S. C. § 610 does not violate the due process clause of the Fifth Amendment to the Constitution of the United States.

CONCLUSION.

For the reasons hereinbefore stated, Respondent Richard A. Ash respectfully requests this Court to affirm the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,
Petitioners,

v.

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS AND GEORGE P. JENKINS, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION,

AND

BETHLEHEM STEEL CORPORATION,

Petitioners,

v.

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

The core considerations which compel reversal of the result reached by a divided court below remain essentially uncontradicted in the briefs urging affirmance.[1]

I. There Is No Basis for Implication of a Private Right of Action for Voters, Citizens and Stockholders From 18 U. S. C. § 610.

In view of Respondent's silence, Petitioners assume it is undisputed that, within the four corners of the Federal Election Campaign Act of 1971 ("FECA"), as a whole, and within § 610, in particular, there is nothing which evidences any Congressional intent to authorize a private suit by any voter or stockholder to seek injunctive relief to restrain, in advance, publication by a corporation of a speech on issues of public concern, or a stockholder's suit for the amount of an expenditure for such publication.

It is similarly undisputed that there is not a word in the legislative history of the FECA, or in the 68-year history of Congressional attention to § 610, which evidences any Congressional intent to authorize such suits.

It is undisputed that there is no general jurisdictional grant either in the FECA or in § 610, as in *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964), which could be construed as a Congressional grant of subject-matter jurisdiction over any such category of "voter" suits or stockholder suits.

Respondent specifically acknowledges, further, that "the *primary* purpose of § 610" is not related to the

1. Petitioners file this brief in reply to the Brief for Respondent, Richard A. Ash ("Ash"), the Brief for the United States as *Amicus Curiae*, and the Brief for *Amici Curiae*, Judith Bonderman, et al. Since the Motion of Common Cause for leave to file a brief, as *amicus curiae*, was denied, by Order dated February 18, 1975, Petitioners make no reply thereto. In references to the briefs in the following discussion "R. Br." denotes "Brief for Respondent," "G. Br." the "Brief for the United States as *Amicus Curiae*," "B. Br." the "Brief for *Amici Curiae*, Judith Bonderman, et al.," and "P. Br." the "Brief for Petitioners."

interests of stockholders, at all, that purpose being rather "to prevent corporations and labor unions from influencing federal elections" (R. Br. at 21).

The judicial "implication" which Respondent attempts to defend is thus based on what is, at best, a secondary purpose of the Act and is not supported by any indication of Congressional intent to authorize stockholder's suits or suits by voters under the Act.

Of further significance, distinguishing this case from *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964); *Wyandotte Transportation Co. v. United States*, 389 U. S. 191 (1967) and *Allen v. State Board of Elections*, 393 U. S. 544 (1969), relied on by Respondent, is the circumstance that here, although it has filed a brief in this case, the Government does not state that its resources to enforce § 610 are in any way inadequate and does *not* ask the Court to supplement the machinery for enforcement of § 610 by creating the private right of action sought by the Respondent. *See, Allen v. State Board of Elections, supra*, 393 U. S. at 557 n. 23; *Holloway v. Bristol-Myers Corporation*, 485 F. 2d 986, 1001 n. 74 (D. C. Cir. 1973). The Government's brief as *amicus curiae* confines itself exclusively to an attempted defense of the constitutionality of § 610.

Important arguments remain unanswered by Respondent's brief. Thus, no attempt whatever is made to detract from the controlling authority of cases such as *Calhoon v. Harvey*, 379 U. S. 134 (1964); *T. I. M. E., Inc. v. United States*, 359 U. S. 464 (1959); and *Nashville Milk Co. v. Carnation Company*, 355 U. S. 373 (1958), holding that where, as here, Congress has expressly provided a particular civil remedy in one title of an act, but not in another title of the same act, it is to be inferred that Congress did not intend a civil remedy in the title in which it did not expressly provide for one. Indeed, Respondent's

brief does not even cite these cases, much less attempt to distinguish them. In view of Respondent's silence, we merely reiterate our reliance upon them.

Significantly, Respondent has not attempted to refute any of the constitutional reasons (P. Br. at 40-45) for refusing to "imply" from a vague and overbroad statute, such as § 610, a private right to bring suits for the avowed purpose of stifling and deterring expression on public issues.

Again, Respondent urges the Court judicially to expand the coverage of § 610 to subsume a new remedy not provided by Congress, but offers no solution to the inevitable partisan abuse of such a remedy, which would invite a flood of frivolous suits brought by like-minded voters, stockholders and union members seeking sensational publicity on the eve of federal elections. The considerations which led the Court in *Nashville Milk Co. v. Carnation Company, supra,* 355 U. S. at 377, 378, to deny a private right of action under the criminal provisions of § 3 of the Robinson-Patman Act, have even greater weight in this case, where First Amendment concerns predominate:

> ". . . Section 3 contains only penal sanctions for violation of its provisions; in the absence of a clear expression of congressional intent to the contrary, these sanctions should under familiar principles be considered exclusive, rather than supplemented by civil sanctions of a distinct statute. See D. R. Wilder Mfg. Co. v. Corn Products Ref. Co., 236 U. S. 165.
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>
> *"It is not an idle conjecture that the possibility of abuse inherent in a private cause of action based upon this vague provision was among the factors which led Congress to leave the enforcement of the provisions of § 3 solely in the hands of the public authorities . . . ."*

As the legislative history of the Federal Election Campaign Act Amendments of 1974 ("FECAA") and the provisions of both the FECA and the FECAA show (P. Br. at 27-33), the inevitable abuse inherent in a private cause of action under the unconstitutionally vague and overbroad provisions of § 610 was a prime motivating factor behind Congress' deliberate choice to withhold a private right of action and limit the power of enforcement of this provision to responsible public officials.

Apart from the fact Respondent ignores the controlling decisions, disregards the important constitutional considerations which rule out an "implied" private right of action under the circumstances of this case, and offers no answer to the decisive problem of inevitable abuse of such a remedy, the arguments Respondent does offer to defend "implication" of a private right of action from § 610 proceed from fundamental misconceptions of the decisions relied upon, faulty reasoning in their application, and an erroneous reading of the plain language of the statute itself.

1. Respondent Erroneously States the Rule of the Decisions on Which He Relies.

Following the majority opinion below, Respondent argues (R. Br. 17) that, assuming a statute "was intended to protect a class of persons, including the plaintiff, from the harm of which plaintiff complains," a private right of action for damages may be "implied" therefrom whenever a federal court deems it *"appropriate"* to do so. In support of this proposition, Respondent quotes approvingly (R. Br. at 18) from Mr. Justice Harlan's concurring opinion in *Bivens v. Six Unknown Agents,* 403 U. S. 388 (1971), a case distinguishable from the case at bar on grounds set forth in Petitioners' principal brief (P. Br. at 33-35). The

quoted language, however, contradicts the rule as stated by Respondent, establishing, in contrast, the more exacting requirement that there be a showing that the remedy sought is "*necessary* to effectuate the congressional policy." 403 U. S. at 403.

2. The Majority Decision Below Rests Upon an Improper Analysis of the "Ambit of Protection" of § 610.

The complaint in this case alleges that Respondent sues (1) individually in his capacity as a citizen and registered voter, and (2) by virtue of the fact he is a stockholder, in a derivative capacity on behalf of Bethlehem (Complaint, paragraph 8; A71). The action is not brought as a class action.

The majority below concluded (A100-102) that Respondent is a member of two classes of intended beneficiaries of § 610 and that, therefore, the first requirement of implication is satisfied in two ways. It is submitted that the majority's conclusion is in error in both respects.

The majority concluded (A100-101), and Respondent argues here (R. Br. at 19-20), that "the primary purpose of § 610 is to prevent corporations and labor unions from influencing federal elections" (R. Br. at 21). Accepting this characterization of the purpose of § 610, the majority deduced that the class of intended beneficiaries of § 610 consists of the class of all citizens and voters in the United States (A101). The majority concluded, therefore, that every citizen and voter in the United States has a private right of action under § 610, assuming a private right of action satisfies the second requirement of being "appropriate" (A100-101). Since Respondent is a citizen and voter the Court inferred that he has a private right of

action under § 610. As Judge Aldisert properly noted in his dissenting opinion (A113-115), the unrestrained approach to implication adopted by the majority leads to the result that "given particular circumstances, a remedy could be fashioned to afford civil relief upon the breach of every criminal statute." Petitioners agree and submit, for this reason, that the majority's conclusion on this point is in error.

The second phase of the analysis, based on the opinion of the majority below, is also misconceived. Respondent acknowledges (R. Br. at 21) that "the *primary* purpose of § 610" is unrelated to the interests of stockholders at all. He argues, however, that a peripheral purpose of § 610 was the protection of the interests of minority stockholders and labor union members and that a private right of action may therefore be "implied." Putting to one side the impropriety of "implying" a private right of action on the basis of an admittedly peripheral purpose, the majority's conclusion (A101) that Respondent has a *derivative* private right of action under this peripheral purpose of § 610 fails to take account of the fact that since Respondent sues *derivatively*, not on behalf of a class of such minority stockholders, he assumes the position of the corporation, pursuing against the directors a claim belonging to the corporation. Even under the expansive approach adopted by the majority below, a necessary precondition to its conclusion (A101, n. 4) that Respondent has a derivative private right of action would be a finding that the *corporation* is within the class of intended beneficiaries of § 610. Corporations, however, are the subjects of § 610's prohibition, and are obviously not within the class of intended beneficiaries of the Act. Accordingly, Petitioners respectfully submit that the result reached by the majority below is erroneous.

3. The Conclusion That a Private Right of Action Is "Appropriate" Is Unconsidered and Unfounded.

In an attempt to establish the second requirement of the inapplicable rule on which he relies, Respondent next argues that implication of a private right of action for every voter, citizen and stockholder for injunctive relief and damage is "appropriate."[2]

In support of this conclusion, Respondent offers five reasons. First it is argued that the agencies charged with enforcement of § 610 lack adequate resources to fulfill this duty. Unlike *J. I. Case Co. v. Borak, supra,* and *Allen v. State Board of Elections, supra,* however, in this case the Government does not support this ground for implication. The Government does not ask this Court to supplement the machinery for enforcement of § 610. In view of the Government's position and in view of the elaborate statutory scheme for civil and criminal enforcement of § 610 recently enacted by Congress in the FECAA, Respondent's contention in this regard is particularly ill-founded.[3]

Respondent's next argument turns on a misreading of the statute itself. Thus, it is argued (R. Br. at 23, 27) that the criminal sanctions provided in § 610 have an "insufficient deterrent effect" because, Respondent suggests, those sanctions are applicable only to the corporations, not to the directors and officers, and are thus, in effect, "imposed on the innocent stockholders" (R. Br. at 24). Section 610 itself provides the refutation of this assertion. It provides that any *officer* or *director* who consents to an illegal expenditure is criminally liable and is subject to a jail sentence of up to two years.

2. As noted above, Mr. Justice Harlan's concurring opinion in *Bivens v. Six Unknown Agents, supra,* which is quoted in part by Respondent, establishes that, where applicable at all, the rule requires that the remedy sought be *"necessary,"* not merely *"appropriate."*

3. The creation of the Federal Election Commission under the FECAA also bears significantly on the *in*appropriateness of a private right of action under § 610. It draws into play the rule of caution against implication of private remedies overlapping the jurisdiction of federal agencies in circumstances where private actions may have a disruptive effect on administration of the regulatory scheme. *See, Holloway v. Bristol-Myers Corporation,* 485 F. 2d 986 (D. C. Cir. 1973).

Following the majority below (A104) Respondent next argues (R. Br. at 24) that the supposed efficacy of swift civil injunctive relief to halt publication of a speech on public issues makes a private civil remedy under § 610 "appropriate" and superior to the criminal sanctions expressly provided by Congress. This rationale, however, is constitutionally impermissible, because such injunctive relief would be barred by the doctrine forbidding prior restraints. *New York Times Co. v. United States,* 403 U. S. 713 (1971); *Organization for a Better Austin v. Keefe,* 402 U. S. 415 (1971); *Near v. Minnesota,* 283 U. S. 697 (1931).

Next, Respondent argues (R. Br. at 22) the "problem of selective enforcement" provides a reason why implication of a private right of action is "appropriate." In this assertion, which is based only on the statement of the majority below that a "possible conflict of interest" on the part of officials charged with the duty of enforcing § 610 "is not simply hypothetical" (A103), Respondent asks the Court to immortalize as an assumption underlying its ruling the proposition that public officials sworn to uphold and enforce the law will regularly and systematically violate the oath of office. Quite apart from the evident impropriety of such an assumption, implication of private remedies from criminal statutes is not the established remedy for misconduct of federal prosecutorial officers. The same dubious rationale of partisan enforcement would broadly justify judicial "implication" of private causes of action from every criminal statute.

The majority's suggestion (A103), as a basis for implication of a private right of action, that violations of § 610 are "acts more likely to be covert than notorious" prosecution of which would be aided by private enforcement, overlooks the fact that what is challenged in this case was the *publication* in newspapers and magazines of expression on public issues.

Sidestepped in this catalog of "reasons" why implication is "appropriate" under § 610 is the question whether alternative remedies exist under state law. On this score, Respondent has in another argument undercut completely the asserted "appropriateness" or "necessity" of a private right of action under § 610. Respondent calls to this Court's attention (R. Br. at 47) the fact that the very same court which has, in this case, held that there exists an *"implied"* right of action under § 610, subsequently held that there *also* exists a private, *state* cause of action for expenditures in violation of § 610. *Miller v. American Telephone and Telegraph Co.*, No. 73-2007 (3d Cir. Opinion filed Nov. 4, 1974).

The test of "appropriateness," moreover, assumed in Respondent's analysis, is not only at odds with the decisions on which Respondent relies, but entails an assessment essentially alien to the judicial function. Institutional disabilities inherent in the nature of the judicial process dictate that the judgment on the "appropriateness" of remedies provided or not provided by Congress is one properly for Congress—not for the federal courts—to decide. This practical conclusion is reinforced by the doctrine of separation of powers.

II. This Court Should Not Consider Respondent's Extraneous Arguments Against Summary Judgment Which Were Not Raised in the District Court, Not Assigned as Error in the Court of Appeals, and Not Fairly Within the Questions Presented by the Petition for Certiorari.

Respondent devotes nearly ten pages of his brief to a discussion of two points which are not properly before the Court and should not be considered.

For the first time in the history of this controversy, Respondent argues (R. Br. at 47-54) that the District Court's grant of summary judgment was improper because "there was an additional theory of recovery cognizable in federal court independent of the implication of a private cause of action" (R. Br., "Questions Presented"). That argument presents the view that the federal district courts have jurisdiction under 28 U. S. C. § 1331 over suits by stockholders asserting a state-created right which arises out of an alleged violation of a federal statute. Putting to one side the fact that, after the district court had required the posting of security for expenses *with regard to Respondent's claim under state law* (A68), Respondent filed his First Amended Complaint (A69-A75) which eliminated his alleged, state-created cause of action, the question Respondent is belatedly attempting to inject here is not properly before this Court for consideration or decision.

Rule 23(1)(c) of the Rules of this Court provides that "only the questions set forth in the petition or fairly comprised therein will be considered by the court." The questions presented by the petition for a writ of certiorari in this case do not even remotely touch upon whether federal courts have subject-matter jurisdiction, absent diversity of citizenship, because this stockholder's suit allegedly "arises under the Constitution, laws, or treaties of the United

States," 28 U. S. C. § 1331. Indeed, Respondent's "Counter-Statement of Questions Presented" in his brief in opposition to the petition, treats only two issues *viz.* whether the Court of Appeals correctly implied a private right of action under 18 U. S. C. § 610, and whether it properly remanded for a determination of whether the expenditures in question were made for a "partisan purpose."

The issue was neither raised nor argued nor decided in the district court. Respondent did not include the question in his statement of issues to be presented for review before the Court of Appeals (A90-A91). The issue was not briefed or argued before the Court of Appeals. The opinions in the Court of Appeals are silent with regard to it. Absent special circumstances, not involved in this case, the uniform practice of this Court has been to disregard such additional questions smuggled into a case after the grant of certiorari. *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U. S. 317, 330 (1967); *Lawn v. United States*, 355 U. S. 339, 362, n. 16 (1958); *California v. Taylor*, 353 U. S. 553, 556 n. 2 (1957); *Irvine v. California*, 347 U. S. 128, 129 (1954).

In the same category of belated attempts to transform the posture of the case in this Court is Respondent's suggestion (R. Br. at 3, 45-46) that this case involves more than the Advertisement, the Speech and the Folder which have been the focus of the case since the day the complaint was filed, and therefore, that the grant of summary judgment was error by reason of the existence of unresolved factual issues. It suffices to say that the opinions in the Court of Appeals did not consider any of Respondent's manufactured factual issues and they should not be considered here. The majority opinion below simply summarized the case as follows (A93): "Plaintiff asserts that the corporate expenditures, for an advertisement and a

pamphlet, violated a federal prohibition on corporate campaign spending, 18 U. S. C. § 610 (1970) as amended (Supp. II 1972)." Respondent filed no Petition for Rehearing.

Moreover, Respondent's assertions are belied by the manner in which the case was presented in the Court of Appeals and in the District Court. Respondent urged the Court below, for example, in his Petition for Rehearing of the appeal from the denial of a preliminary injunction, to decide the entire case on the papers (Petition for Rehearing dated January 19, 1973, at 4). Respondent stated in support of this request that there had been a "full hearing on the issues at the district level" (*id.* at 4), that "the complaint set forth very specific acts of defendants" and summarized his case (*id.* at 4):

> "Simply put, Appellant alleged that Bethlehem Steel *was carrying out illegal advertising.* Appellees agreed that the advertising was being carried out but disagreed that it was illegal." (Emphasis added.)

It is submitted that the additional, extraneous issues Respondent now attempts to inject are not properly before this Court and should not be considered here.

III. On Its Face and as Construed and Applied by the Majority Below, § 610's Prohibition, Directed Only Against Labor Unions and Corporations, Deprives Labor Unions and Corporations of Equal Protection of the Laws in Violation of the Fifth Amendment.

Not surprisingly, neither the Government nor the Respondent questions the proposition that corporations and labor unions are entitled to equal protection of the laws. The decisions of this Court definitively establish that right. *Grosjean v. American Press Co., Inc.*, 297 U. S. 233, 244 (1936); *Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105

(1928); *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1928).

It is argued, however, that since § 610 does not create an inherently suspect classification, "it cannot be held to violate the due process clause unless no rational basis for the statute may be discerned" (R. Br. at 69). Proceeding from this premise, Respondent attempts to establish that the challenged classification has some rational basis. It is submitted, however, that the offered analysis begins and ends in error.

Legislative classifications aimed at selective prohibition of conduct protected by the First Amendment are not judged by the less exacting standard of "rational relationship" to a legitimate interest. Like "inherently suspect" classifications, classifications which are the basis for selective prohibition or regulation of activity protected by the First Amendment are subject to a more searching standard of judicial review. A claimed justification for selective exclusion from the public forum is to be "carefully scrutinized." *Police Department v. Mosley*, 408 U. S. 92, 98-99 (1972). Differential treatment can be justified in this "First Amendment—Equal Protection intersection" only upon a showing of a *compelling* governmental interest in the discriminatory treatment. *See, Williams v. Rhodes*, 393 U. S. 23, 31 (1968).

As the briefs of Respondent and the Government persuasively demonstrate, no such compelling governmental interest justifies the arbitrary and invidious classification upon which § 610's criminal prohibition is based. They demonstrate, on the contrary, that the discriminatory classification of § 610 is irrational, unreasonable and legitimated by relationship to no governmental interest at all, much less a compelling one. While the Government argues that it is "rational to hold corporations and labor unions to a different and more stringent standard" (G. Br. at 35),

the Government does not explain why it is "rational" that more than 50 common-law trusts and voluntary associations listed on the New York Stock Exchange which are not corporations should have the ability to make expenditures to participate in public debate on governmental issues, to reply to statements and accusations levelled by politicians seeking federal office and to make contributions, all exempt from § 610's criminal prohibition. It is just as plain that there is no "compelling governmental interest" which justifies the exemption from § 610 of numerous real estate investment trusts some having assets in excess of hundreds of millions of dollars, the exemption of limited partnerships, associations, and other unincorporated business entities, or the exemption of the medical, farm and other organizations which actively participate in debate on public issues. Indeed, the unconstitutional rationale of § 610 cannot rationally be confined to corporations and labor unions, but logically extends to every type of business organization and association and to all aspects of public debate to "justify" stifling the flow of politically relevant information to the public. Section 610's selective prohibition bears no rational relationship to *any* governmental purpose and that prohibition plainly denies equal protection of the laws to labor unions and corporations.

IV. On Its Face and as Construed and Applied by the Majority Below, § 610 Is Violative of the Freedoms of Speech, Press, Petition and Association Guaranteed by the First Amendment.

In defense of § 610, both Respondent (R. Br. at 55-60) and the Government (G. Br. at 26-29) urge that corporations should not be afforded full protection of the First Amendment. No decision of this Court is cited in support

of the proposition that corporations do not enjoy the full protection of the First Amendment. As demonstrated in the Petitioners' principal brief (P. Br. at 63-64), the decisions of this Court are to the contrary. In a series of inapposite citations, the Government shows that newspapers are subject to the antitrust laws, newspapers are subject to the National Labor Relations Act and that corporations do not enjoy the protection of the Fourth and Fifth Amendments. The Government's citation of *Paul v. Virginia,* 8 Wall. 168 (1869), however, demonstrates the complete irrelevance of this line of authorities. Addressing itself squarely to the issue of a corporation's First Amendment rights, this Court in *Grosjean v. American Press Co., Inc.,* 297 U. S. 233, 244 (1936) answered the argument here advanced by the Government and expressly distinguished *Paul v. Virginia,* on the ground that the decision dealt solely with the Privileges and Immunities Clause, not the Due Process Clause, of the Fourteenth Amendment. Significantly, in *United States v. C. I. O.,* 335 U. S. 106 (1948), both the majority and concurring opinions assumed that corporations enjoy the full protection of the First Amendment, and concluded that the grave constitutional deficiencies of § 610 exist for corporations as well as labor unions.

In their attempted defense of § 610, moreover, both Respondent and the Government conveniently ignore the essential role of the First Amendment in the program of self-government established by the Constitution:

> "When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied

> acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government."[4]

In sharp conflict with the First Amendment, the Government again argues—as it did in *United States v. C. I. O., supra,* and in *United States v. U. A. W.,* 352 U. S. 567 (1957)—that the mutilation of the thinking process of the community brought about by § 610's prohibition against expenditures for speech is necessary to avoid an "undue influence" (G. Br. at 23). It is submitted that, as a proposed justification of § 610's flat prohibition, the "undue influence" rationale did not survive the concurring opinion of Mr. Justice Rutledge in *United States v. C. I. O., supra,* 335 U. S. at 145-146.

The Government's confused attempt to defend the constitutionality of § 610 demonstrates only that § 610 is indefensible. On the one hand, the Government argues (G. Br. at 30) that "[t]he statutory scheme evidences the 'precision of regulation' which this Court has said to be the 'touchstone in an area so closely touching our most precious freedoms.'" On the following page of its brief (G. Br. at 31), however, the Government, with commendable candor, expressly admits that, far from evidencing the required "precision of regulation," the statute is *overbroad,* as Petitioners contend, and by its very terms prohibits conduct which is clearly protected by the First Amendment. The

4. A Meiklejohn, POLITICAL FREEDOM: *The Constitutional Powers of the People* 27.

Government concedes (G. Br. at 31) that in its application to corporate expenditures for "advertising dealing solely with issues" the "expenditure" provision of § 610 infringes "upon First Amendment values."[5] Having admitted that § 610 is overbroad because it prohibits constitutionally protected corporate expenditures for "advertising dealing solely with issues," the Government would be obliged to admit, as well, that § 610 is overbroad because it prohibits, by its terms, *labor union* expenditures for "advertising dealing solely with issues." Again, in view of *Mills v. Alabama*, 384 U. S. 214 (1966), in which the Court struck down an ordinance prohibiting election-day newspaper editorials endorsing political candidates, the Government would, of course, be obliged to admit that § 610 is also overbroad in its application to expenditures of a corporation owning a newspaper for the purpose of publishing such an editorial.[6] On the Government's reading of § 610, the criminal prohibition apparently extends to expenditures from a labor union's or corporation's general treasury, even if the members or stockholders unanimously consent to the expenditure. The "undue influence" rationale notwithstanding, § 610 by its terms is just as applicable, on the Government's view, to an expenditure for a one-dollar advertisement as it would be to a one-thousand-dollar advertisement.

5. In conceding that § 610 is overbroad because it prohibits corporate expenditures for "advertising dealing solely with issues," the Government, of course, admits, as well, the poverty of both the "undue influence" rationale and the so-called "minority protection" rationale. Each of these supposed "justifications" of § 610 "justifies" the very application of § 610 which the Government admits is unconstitutional.

6. At least one court has rejected the Government's theory, in that case, that there is any constitutionally significant difference between a paid political advertisement and a newspaper editorial endorsing a candidate. *United States v. National Committee for Impeachment*, 469 F. 2d at 1140, n. 12, 1142, n. 15.

The Government apparently takes the position (G. Br. at 31) that § 610 would be applicable where an advertisement "impliedly referred to a candidate." This position is, of course, inconsistent with the strong implication in the opinion of the Court in *United States v. U. A. W.*, 352 U. S. 567, 592 (1957) (in listing factors relevant to the constitutional issue) that § 610 would be unconstitutional if it makes criminal advertising which "simply state[s] the record of particular candidates on economic issues," which obviously entails referring to candidates by name. It is also apparently inconsistent with the position the Government took in *United States v. U. A. W., supra*.[7] What emerges from the Government's concession and the discussion in *U. A. W.* is that the Government cannot, consistent with the First Amendment, proscribe an expenditure for an advertisement which mentions the name of a candidate, states his record on economic issues and discusses those issues. The advertising involved in this case mentions the name of *no* political party or candidate for federal office and falls well within the scope of the protection afforded by the First Amendment.

Having conceded that § 610 is overbroad as it applies to expenditures for advertising which deals "solely with issues," the Government fails to provide any guide for determining where an advertisement stops dealing "solely with issues" and begins "impliedly referring to a candidate." What is constitutionally significant is that the statute itself provides no such guide either, in this area where "precision of regulation must be the touchstone," *N. A. A. C. P. v. Button*, 371 U. S. 415, 438 (1963), and

7. In its brief in *U. A. W.*, the Government cited, as an example of *permissible* expenditure under § 610, the expenditure of labor union funds for radio broadcasts "on the legislative issues, action of Congress, and the voting records of Congressmen on specific pieces of legislation." ("Brief for the United States" at 50). The Government cannot have it both ways.

where legislation must be narrowly drawn to meet the precise evil.

While conceding that § 610 is overbroad, the Government, in its brief (G. Br. at 29-30), relies on *Civil Service Commission v. Letter Carriers,* 413 U. S. 548 (1973), to support its contention that § 610's prohibition of expenditures for advertising of the kind involved here, does not violate the First Amendment.

Dealing with the question whether § 9(a) of the Hatch Act, 5 U. S. C. § 7324(a)(2), was, on its face, unconstitutionally vague and overbroad, the Court in *Letter Carriers,* emphasized throughout its opinion that the Hatch Act *specifically exempted* from the scope of its prohibitions expressions by federal employees of their opinions, publicly or privately, on political issues and candidates (413 U. S. at 561-62). While holding that the Hatch Act constitutionally proscribed "plainly identifiable acts of political management and political campaigning" (413 U. S. at 567), the Court stated (413 U. S. at 575-76):

> "Whatever might be the difficulty with a provision against taking 'active part in political management or in political campaigns,' the Act specifically provides that *the employee retains the right . . . to express his opinion on political subjects and candidates.*" (Emphasis added.)

But, it is precisely that expression of opinion that is flatly prohibited by § 610, according to the Government and the Respondent. Indeed, according to Respondent and the Court below, a corporation can express *no* opinion, can express nothing, with respect to public issues or candidates.

The Government misperceives the holding of the Court in *Letter Carriers* and its relevance to the case at bar. For, in *Letter Carriers* a regulatory scheme had been formulated

by the Civil Service Commission and engrafted onto the substantive provisions of the Hatch Act. Thus, statutory language, though itself vague and overbroad, became precise and the acts prohibited by it "easily identifiable." There is, however, no body of law, statutory, judicial or administrative, to rescue § 610 from the clearly unconstitutional vagueness and overbreadth which its attempted application in this case underscores. For these reasons, it is submitted that this Court should hold § 610 unconstitutional as violative of the First Amendment.

V. CONCLUSION.

For all of the foregoing reasons, Petitioners respectfully request that the Judgment of the court below should be reversed.

Respectfully submitted,

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No. 73-1908

In the Supreme Court of the United States

OCTOBER TERM, 1974

STEWART S. CORT, ET AL., PETITIONERS

v.

RICHARD A. ASH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the following question:

Whether 18 U.S.C. 610, which regulates political contributions in connection with federal elections made by corporations,[1] violates the First Amendment

---

[1] Although Section 610 pertains to both corporations and labor unions, for the purposes of this brief we discuss its applicability to corporations only.

or denies corporations or their stockholders equal protection.

INTEREST OF THE UNITED STATES

One of the issues petitioners raise is the constitutionality of 18 U.S.C. (Supp. II) 610, recently reenacted and amended in Title II of the Federal Election Campaign Act of 1971, which prohibits corporations and labor unions from making contributions and expenditures from general funds in connection with any federal election. It provides criminal penalties of up to $5000 in fines for corporations and labor organizations that violate its provisions, and up to $1000 and one year imprisonment for officers or directors who consent to the prohibited contributions or expenditures.

In the present case, a shareholder of Bethlehem Steel Corporation alleged that the directors of Bethlehem had violated Section 610, and sought injunctive relief and compensatory and punitive damages on behalf of Bethlehem, asserting that the statute provides an implied private cause of action. One of the defenses asserted by the directors was that Section 610 is unconstitutional.[2] If the Court reaches that issue (see *infra*, pp. 10-11), its determination would have a significant impact upon the United States with respect to prosecutions under this provision and

[2] The United States takes no position on the other major question in this case: whether there is a private right of action for violation of Section 610.

perhaps with respect to its efforts to enforce other federal campaign financing laws. See *e.g.*, *United States* v. *Finance Committee To Re-Elect The President*, C.A.D.C., No. 73-1918, decided December 2, 1974; *Pichler* v. *Jennings*, 347 F. Supp. 1061 (S.D. N.Y.); *American Civil Liberties Union* v. *Jennings*, 366 F. Supp. 1041 (D. D.C.), probable jurisdiction noted *sub nom. Staats* v. *American Civil Liberties Union*, 417 U.S. 944.[3]

STATUTES INVOLVED

18 U.S.C. 610 provides:

> *Contributions or expenditures by national banks, corporations or labor organizations.*
>
> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presi-

[3] The *Pichler* and *Finance Committee* cases involve attacks upon the campaign contribution reporting provisions of Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. (Supp. II) 431-441). *Staats*, currently before the Court, focuses upon Title I of the same Act (47 U.S.C. (Supp. II) 801-805), which regulates campaign spending for communications media advertisement. Section 610 was amended as part of Title II of the Act (18 U.S.C. (Supp. II) 610).

dential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 205 of the Federal Election Campaign Act of 1971, 86 Stat. 10, amended Section 610 by adding

at the end of that section the following paragraph (18 U.S.C. (Supp. II) 610):

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided*, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

STATEMENT

Respondent, a shareholder of Bethlehem Steel Corporation ("Bethlehem"), instituted this suit against Bethlehem's directors shortly before the 1972 presidential election, both individually and derivatively on behalf of the corporation. He alleges that the directors violated 18 U.S.C. 610 by using Bethlehem's general corporate funds "to influence the United States electorate to help bring about a Republican Party victory" in the election (A. 8, 11).[1]

The suit was induced by an advertisement paid for by Bethlehem which appeared in many national magazines and whose basic theme, respondent averred, constituted an endorsement of the 1972 Republican Party candidate (A. 31). While the advertisement did not mention any candidate by name, it criticized the "careless rhetoric and accusations that are being thrown around" in the presidential campaign, "their main target being the business community," and referred disapprovingly to a statement "made by a political candidate" (A. 31). The advertisement also indicated that upon request Bethlehem would send the text of the speech given by the Chairman of the Board of Bethlehem (A. 32), from which the advertisement was derived. The full speech made several other disapproving references to "a prominent presidential candidate" and a "campaign based on cynicism and mistrust" (A. 32).

[1] "A." refers to petitioners' Appendix; "Br." refers to petitioners' brief.

In its opinion denying respondent's motion for a temporary restraining order (A. 19), the district court held that since the Department of Justice had exclusive authority to enforce Section 610, no private cause of action could be implied (350 F. Supp. 227, 231; A. 52-53), and that the advertisement did not constitute an expenditure prohibited by Section 610 because the advertisement did not mention any candidates specifically by name. The court considered it unnecessary to resolve the defendants' First Amendment challenges to the provision.

Petitioners subsequently filed a motion for summary judgment in the district court (A. 79), which was granted without opinion (A. 87). The court of appeals reversed (496 F.2d 416; A. 92), holding that there is a private cause of action for violation of Section 610, and the proscription in Section 610 applies to any expenditure made with a "partisan purpose," that is, made "for the purpose of influencing someone's election to federal office" (496 F.2d at 425; A. 106), even though it did not expressly mention a candidate by name.

The court concluded that because there was a factual dispute whether the Bethlehem advertisement was partisan, the district court erred in granting summary judgment. The court declined to address petitioners' contention that Section 610 was unconstitutional, noting that since the district court had not resolved the issue, it could be reasserted on remand (496 F.2d at 426; A. 108).

SUMMARY OF ARGUMENT

The statutory scheme in 18 U.S.C. 610 comes within the broad power of Congress to enact legislation aimed at preserving the integrity of the electoral process, which includes the authority to prevent the corrupting effect upon politics of unchecked political spending by corporations. Control over corporate political spending has been one historical cornerstone of three-quarters of a century of continued congressional effort to limit the impact of aggregated power upon politics. Many decisions of this Court have recognized the legitimacy of that effort.

The means chosen to limit corporate power in the electoral process, through Section 610, are reasonably calculated to fulfill Congress' legitimate objective without undue effect upon First Amendment rights. The restrictions are narrowly drawn: they permit corporations to make political contributions so long as the funds have been voluntarily contributed by shareholders, and they allow corporate officers to supervise the political funds and decide how they will be spent. They also permit the corporation to expend general non-contributed funds for the purpose of administering and soliciting voluntary contributions.

Section 610 prohibits only the use of general corporate funds in connection with federal elections, because such expenditures have a disproportionate impact upon the electoral process in that they do not necessarily reflect the particular political sentiments of individual investors who are the sources of the

funds. A corporation thereby able to aggregate funds for political purposes which could not otherwise be aggregated on a voluntary basis would have political leverage of a kind unavailable even to organized blocs of partisan contributors. The net effect of Section 610, therefore, is to eliminate this disproportionality and assure that corporate political expenditures represent only those funds voluntarily contributed by shareholders for avowedly political purposes.

The statutory scheme places no restraint upon the First Amendment rights of shareholders to express their political views and associate for political ends. To the contrary, Section 610 furthers First Amendment interests by protecting the rights of shareholders whose political views are either in the minority or at odds with the views of corporate officers, since it prevents the corporation from using general corporate funds for political purposes. Similarly, Section 610 permits corporate officers free reign to express their views, so long as they do not draw upon general corporate funds to do so. Moreover, the statutory scheme only has an incidental effect upon the First Amendment rights of corporate entities.

Nor is the statutory scheme, barring corporate expenditures made from general funds "in connection with any election," unconstitutionally overbroad nor impermissibly vague. Its proscriptions comprehend a range of corporate conduct which is easily identifiable and commonly understood. Any overbreadth is insubstantial in relation to the unquestionably valid

scope of the statute, and the statute is sufficiently definite to give notice of the proscribed conduct.

Finally, contrary to petitioners' assertion, it is no violation of equal protection to hold corporations and labor unions, in Section 610, to a higher standard of behavior than voluntary associations, partnerships, or other unincorporated organizations—none of which poses as great a potential for abuse of the electoral process. In any event, Congress may act selectively, and a prohibition within its power directed at a particular class is not rendered invalid because it does not also reach every other class upon which Congress may constitutionally place similar restrictions.

ARGUMENT

The contention that Section 610 is unconstitutional was made as a defense to a claim by a shareholder that the directors of Bethlehem Steel Corporation violated that section through certain acts done at the time of the 1972 presidential election. Neither the district court nor the court of appeals reached the issue; indeed, in declining to do so, the court of appeals noted that the issue would be open on the remand that it ordered. The petition for certiorari raised the constitutional issue, and this Court granted the petition without limitation.

Although the issue is thus before the Court, under this Court's settled practice of not deciding constitutional questions unless necessary, and particularly when the lower courts have not reached them, we

believe that there is no occasion for the Court to reach the question in this case. Indeed, in *United States* v. *Automobile Workers*, 352 U.S. 567, the Court in a similar situation declined to consider constitutional challenges to Section 610.[5]

If this Court reaches the constitutional question, the validity of the restrictions in Section 610 upon corporate campaign expenditures must be evaluated in light of (1) the broad congressional authority under the Constitution to regulate and control federal elections, which includes the power to prevent their corruption by corporate political expenditures, and (2) the narrow prohibitions of the statutory scheme, which must be viewed in relation to the precise abuses which Congress sought to correct. We shall show that Congress has authority to impose limitations upon corporate political expenditures, and that the restrictions in 18 U.S.C. 610 are constitutional.

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[5] In both *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 110, and *Pipefitters* v. *United States*, 407 U.S. 385, 399-400, the Court found it unnecessary to reach the constitutionality of Section 610 because it was able to dispose of the cases on non-constitutional grounds. The statute and its predecessors have been upheld in *United States* v. *United States Brewers' Association*, 239 Fed. 163 (W.D. Pa.); *United States* v. *Painters Local Union No. 481*, 79 F. Supp. 516 (D. Conn.), reversed on other grounds, 172 F. 2d 854 (C.A. 2); *United States* v. *Boyle*, 482 F. 2d 755 (C.A. D.C.).

I. THE BOARD POWER OF CONGRESS TO REGULATE FEDERAL ELECTIONS TO PREVENT THEIR CORRUPTION AUTHORIZES A PROHIBITION UPON CORPORATE POLITICAL EXPENDITURES FROM GENERAL CORPORATE FUNDS.

1. Congress has broad power to enact legislation aimed at preserving the integrity of the electoral process.[6] Starting with *Ex Parte Siebold*, 100 U.S. 371, and *Ex parte Clarke*, 100 U.S. 399, this Court has upheld the authority of Congress to prohibit actions that directly violate the integrity of the election process, such as stuffing ballot boxes or failing to return poll books. In *Ex parte Yarbrough*, 110 U.S. 651, the Court, in upholding a conviction for beating a Negro to prevent him from voting in a congressional election, essayed the broad scope of congressional power to safeguard the federal electoral process, and concluded that:

> If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, *the free use of money in*

[6] The authority over congressional elections stems from Article I, Section 4 of the Constitution, which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations * * *." The authority to protect presidential elections apparently stems from the "necessary and proper" clause of the Constitution (Art. I, Sec. 8, Cl. 18); see *Ex parte Yarbrough*, 110 U.S. 651, 658; *Burroughs and Cannon* v. *United States*, 290 U.S. 534, 545.

> *elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.*
>
> If the government of the United States has * * * no authority to provide against these evils, * * * then, indeed, is the country * * * at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other. [*Id.* at 667; emphasis added.]

In *Burroughs and Cannon* v. *United States*, 290 U.S. 534, the Court upheld the constitutionality of the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, 2 U.S.C. 241 *et seq.*, which limited the amounts candidates for congressional elections could spend and required the disclosure of contributions to and expenditures by political committees, as applied to the election of presidential and vice presidential electors. In rejecting the contention that the Act could not be applied to that election because under Article II, Section 1 of the Constitution only the States, but not Congress, could thus regulate presidential elections, the Court said (290 U.S. at 545):

> To say that Congress is without power to pass appropriate legislation to safeguard [a Presidential] election from the improper use of money to influence the result is to deny to the nation in a vital particular power of self protection.

In *United Public Workers* v. *Mitchell*, 330 U.S. 75, 78, the Court sustained the congressional power to forbid any employee of the federal executive branch from "taking 'any active part in political

management or political campaigns.'" The *Mitchell* decision was based on *Ex parte Curtis*, 106 U.S. 371, in which "[t]he right to contribute money through fellow employees * * * was held not to be protected by any constitutional provision." 330 U.S. at 97. See also *United States* v. *Wurzbach*, 280 U.S. 396; *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548.

The Court has also sanctioned congressional authority to regulate the political activity of individuals and organizations who are employed by state governments but paid from federal funds, *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127; who are on federal premises, *United States* v. *Thayer*, 209 U.S. 39; or who receive or solicit contributions for the purpose of influencing legislation, *United States* v. *Harriss*, 347 U.S. 612; see also, *Egan* v. *United States*, 137 F.2d 369 (C.A. 8), certiorari denied, 320 U.S. 788 (employees of organization chartered or regulated by federal law).

The power of Congress to safeguard "the integrity of [the] basic governmental process [of elections]" (*United States* v. *Harriss*, *supra*, 347 U.S. at 625), includes the power to control corporate political spending. Uncontrolled corporate political expenditure would entail as much an "improper use of money to influence the result" (*Burroughs and Cannon*, *supra*, 290 U.S. at 545) of an election as the use of funds for corrupt purposes. Fifty years ago, during the debates on the Federal Corrupt Practices Act of

1925, Senator Robinson stated (65 Cong. Rec. 9507-9508):

> Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.

These problems are no less serious today than they were in 1925. Large corporations have access to funds far beyond the financial resources of most individuals. Were these organizations free to use their resources for political purposes without limitation, there would be a serious danger of corrupting the electoral process.

2. The restriction upon the political power and influence of corporations in Section 610 has been one cornerstone of Congress' continuing "concern for elections 'free from the power of money'" (*United States* v. *Automobile Workers*, 352 U.S. 567, 575). The history of congressional action "to protect the political process from what it deemed to be the corroding effect of money employed in elections by *aggregated power*" (*id.* at 582; emphasis supplied) began almost three quarters of a century ago. President Roosevelt's 1906 message to Congress recommended as the first item of congressional action a law prohibiting political contributions by corpora-

tions. 41 Cong. Rec. 22. Shortly thereafter, in 1907, Congress provided:

> That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator. [34 Stat. 864-865.]

As this Court indicated, the aim of this statute "was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" (*Automobile Workers, supra,* 352 U.S. at 575).

Shortly thereafter, Congress enacted a publicity law that required committees attempting to influence the results of congressional elections in two or more states to report all contributions and disbursements and to identify contributors and recipients of substantial sums. 36 Stat. 822. In 1911 Congress enacted the first limitations on spending for congressional campaigns, which also prohibited candidates from promising employment for the purpose of obtaining support. 37 Stat. 25. In 1918 Congress made

it unlawful either to offer or to solicit anything of value to influence voting. 40 Stat. 1013.

The Federal Corrupt Practices Act of 1925, 43 Stat. 1070, codified and revised this legislation. Section 313 of the Act strengthened the 1907 statute by prohibiting "contributions" as well as "money contributions," extending the prohibition on corporate contributions to the election to Congress of Delegates and Resident Commissioners, and penalizing the recipient of any forbidden contribution as well as the contributor.

Fifteen years later, when Congress extended the Hatch Act, 53 Stat. 1147, it imposed further limitations upon political contributions: it set a maximum of $5000 on contributions by a person to any candidate or to any committee supporting him, and limited to $3 million the total expenditures which a political committee could make in any year. 54 Stat. 767. In offering these latter provisions, Senator Bankhead expressed Congress' continuing concern with the corrupting impact of money on politics (86 Cong. Rec. 2720):

> We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose

of paying the expenses of campaigners sent out into the country to spread propaganda, both true and untrue.

These restrictions were extended to labor unions in the Labor Management Relations Act of 1947 (61 Stat. 136, 159-160), to mitigate "the undue and disproportionate influence of labor unions upon federal elections" and "to preserve the purity of such elections * * * against the use of aggregated wealth by union as well as by corporate entities" (*United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 134).

The problem of controlling the financing of elections has received continued attention from Congress in the Federal Election Campaign Act of 1971 (86 Stat. 3, 47 U.S.C. (Supp. II) 801, *et seq.*) and the 1974 amendments to that Act (Public Law 93-443, 88 Stat. 1263, *et seq.*).

In view of Congress' continuing efforts to limit the influence of money upon the political process, and the many decisions of this Court which have recognized the legitimacy of those efforts, Congress certainly has authority to control what has been viewed for three quarters of a century as a primary source of election abuse: corporate political contributions. The only issue is whether the means chosen to control the abuse are reasonably calculated to do so, without undue effect upon First Amendment rights. "The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Con-

gress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone" (*Burroughs and Cannon*, *supra*, 290 U.S. at 547-548).

As we now show, the restrictions imposed upon corporations by Section 610 comprise an appropriate and reasonable method for "protect[ing] the political process from * * * the corroding effect of money employed in elections by aggregated power" (*Automobile Workers*, *supra*, 352 U.S. at 582).

II. THE LIMITATIONS UPON CORPORATE POLITICAL CONTRIBUTIONS IN 18 U.S.C. 610 ARE CONSTITUTIONAL BECAUSE THEY ARE A REASONABLE METHOD OF PROTECTING THE ELECTORAL PROCESS.

A. The Statute does not violate the Constitutional Rights of Corporations, their Officers, or their Shareholders.

Petitioners predicate their constitutional argument on the proposition that Section 610, as applied, constitutes a "blanket prohibition of contributions and expenditures by labor unions and corporations" (Br. 61). To the contrary, the limits embodied in Section 610 are narrowly drawn and are reasonably calculated to avoid the specific abuses at which Congress aimed. Rather than constituting "blanket prohibition" on corporate political expenditures, they merely assure that such political expenditures repre-

sent the voluntary contributions of individual shareholders.

Section 610 makes it unlawful for any corporation or any labor union

> to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices * * *.

In *Pipefitters* v. *United States*, 407 U.S. 385, 401, this Court held that this prohibition does not apply to contributions or expenditures derived from *voluntarily* financed union political funds segregated from other union funds. The Court also stated in *Pipefitters* that solicitation by union officials is permissible, so long as it is conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job or any other reprisal within the institution's power. *Id.* at 414. Moreover, the Court construed Section 610 to permit union officials to decide how the monies raised will be spent, and to control the voluntarily contributed funds. *Id.* at 415.

The same principles, we submit, are equally applicable to corporations. That is, the statute does not bar corporate political contributions which represent funds voluntarily contributed by stockholders for that

purpose, nor does it bar corporate officials from soliciting stockholders to make such contributions.

Section 205 of the Federal Election Campaign Act of 1971, 86 Stat. 10, confirmed that "§ 610 does not apply to union and corporate contributions and expenditures from political funds financed in some sense by the voluntary donations of employees [and stockholders]" (*Pipefitters*, *supra*, 407 U.S. at 409) by amending Section 610 to include the following paragraph:

> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; *but shall not include communications by a corpoation to its stockholders and their families* or by a labor organization to its members and their families *on any subject; non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stocksolders and their families, or* by a labor organization aimed at its members and their families; *the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation* or labor organization: *Provided*, That it shall be unlawful

> for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction. [Emphasis supplied.]

The 1971 amendment also excludes from coverage corporate funds used for "the establishment, administration, and solicitation of contributions to a separate segregated fund * * *."

Thus, a corporation may use funds for political purposes which stockholders voluntarily contributed and solicit contributions for political purposes from shareholders and their families. Indeed, the amended statute expressly permits political communication by a corporation to its shareholders and their families, and non-partisan registration and "get-out-the-vote" campaigns by a corporation aimed at its shareholders and their families.

The statutory scheme of Section 610 thus permits extensive political communication by corporations: corporations may send political advertising to their shareholders and solicit them for political contributions; corporations may also communicate their political views to the public at large as long as the communications are financed from the voluntary contributions of individual shareholders. The statute therefore is narrowly drawn to avoid the precise evil about which Congress was concerned—the undue influence upon the electoral process that the use of general corporate funds is likely to create.

The constitutional issue is thus a narrow one: whether a corporation, which is organized for other than political purposes, may be barred from making political contributions and expenditures from its general funds.

One of Congress' concerns about unlimited corporate spending was the disproportionate impact it would have upon the political process—exceeding the abilities of any individual or bloc of individuals to have their voices heard. Corporate political expenditures drawn from general corporate funds have a disproportionate impact simply because such expenditures do not necessarily reflect the political views of the individual shareholders who are the sources of the funds. A corporation that was thereby able to aggregate funds for political purposes which could not otherwise be aggregated on a voluntary basis would have political leverage of a kind unavailable even to organized blocs of partisan contributors. Indeed, one reason for the restrictions embodied in Section 610 was "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders" (*United States* v. *Congress of Industrial Organizations, supra*, 335 U.S. at 113). See Hearings before the House Committee on the Election

of the President, 59th Cong., 1st Sess. 76; 40 Cong. Rec. 96.

The net effect of Section 610 is to eliminate this disproportionality and assure that corporate political expenditures represent only those funds voluntarily contributed by shareholders for avowedly political purposes. The scheme comprises a reasonable means of limiting undue corporate leverage in the political process without encroaching upon the First Amendment rights of shareholders or corporate officers, and only incidentally affecting the First Amendment rights of corporations.

1. ***The First Amendment Rights of Shareholders.***

As noted above, Section 610 permits individual shareholders to make voluntary political contributions through the corporation. It therefore imposes no restraint upon their right to express political views.

Nor does Section 610 restrict the collective voice of groups of shareholders who share the same political sentiments. It does not bar the formation of voluntary political organizations by shareholders to express their political views, even by the pooling of money they voluntarily furnish for the purpose of making political contributions. Indeed, by preventing the use of corporate funds to support political candidates whom some stockholders may oppose, the statute furthers First Amendment interests.

The Amendment rests on the premise "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the

welfare of the public." *Associated Press* v. *United States*, 326 U.S. 1, 20. In preventing shareholders from using corporate funds to support candidates opposed by minority shareholders (and corporate management from deciding, on behalf of all shareholders, which candidate to support), the statute protects, rather than restricts, the First Amendment freedoms of individual shareholders.

As Congressman Williams of Mississippi commented during the hearings on the original Act of 1907:

> [N]o corporation has the right, and no board of directors of a corporation and no manager of a corporation has the right, to embezzle the money belonging to the stockholders of the corporation and to divert it from its legitimate use to a purpose for which the company was not chartered by appropriating it to Democratic, Republican, Populist, Socialist, or any other campaign fund. [Hearings before the House Committee on the Election of the President, 59th Cong., 1st Sess. 76; 40 Cong. Rec. 96.]

2. ***The First Amendment Rights of Corporate Officers.***

Section 610 does not abridge the First Amendment rights of corporate officers to express their political views. Contrary to petitioners' assertion, Section 610 does not have a "chilling effect" upon the exercise of those rights (Br. 68), and it does not, as the *amicus* maintains, entail a prior restraint designed "to silence a corporate officer" (*Amicus* Br. of the Chamber of Commerce of the United States, 32).

Petitioner Cort, the Chairman of the Board of Bethlehem Steel, was free to speak out against, as he put it, the "false statements" and "outrageous accusations" about the business community made by "a political candidate" in the 1972 presidential election (App. 31), and he was free to advertise his message so long as he did not spend general corporate funds to do so. He was also free to publish a pamphlet criticizing the views of "a prominent presidential candidate" (App. 32), so long as he did not finance the pamphlet from unsegregated corporate funds.

The sole restriction upon corporate officers in Section 610 is that they cannot use for political purposes unsegregated corporate funds which were not expressly contributed by shareholders for such purposes. Section 610 puts corporate officers on the same footing as everyone else under the First Amendment—they can make their own political contributions and expenditures out of their own pockets but cannot draw upon general corporate funds for that purpose.

3. *The First Amendment Rights of Corporations.*

As noted above, Section 610 permits corporations to make political expenditures from a segregated political fund voluntarily contributed by shareholders. The statute also permits corporations to establish and administer such a fund, and to solicit voluntary contributions to the fund, even if the cost of administering and soliciting derives from general corporate funds. The corporation also may conduct a nonpartisan registration campaign aimed at its share-

holders. Beyond these types of political participation, however, the corporation as an entity may not venture.

The limits upon corporate political expenditures prescribed in Section 610 do not unconstitutionally restrain the First Amendment rights of corporations. As this Court stated in *Younger* v. *Harris*, 401 U.S. 37, 51:

> Where a statute does not directly abridge free speech, but—while regulating a subject within the state's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. [Citations omitted.]

That standard, equally applicable to the federal government, is satisfied in the present case. The statute "is unrelated to the suppression of free expression" (*United States* v. *O'Brien*, 391 U.S. 367, 377). To the contrary, its purpose and effect is to further free expression by preventing the disproportionate influence that corporations—as entities apart from their shareholders and officers—could exert upon the political process by using general corporate funds to support particular candidates.

A corporation is subject to much greater regulation than individuals, and the scope of permissible governmental control over it is necessarily broader than it is with regard to individuals. As this Court

said in *United States* v. *Morton Salt*, 338 U.S. 632, 651, 652 (dealing with Fourth and Fifth Amendment challenges to the corporate reporting requirements of the Federal Trade Commission Act):

> [C]orporations * * * are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favor from government often carry with them an enhanced measure of regulation.
>
> * * * * *
>
> [T]he disparity between artificial and natural persons is so significant that differing treatment can rarely be urged as an objection to a particular construction of a statute.

See also *Orient Insurance Co.* v. *Daggs*, 172 U.S. 557, 561; *Paul* v. *Virginia*, 8 Wall. 168.

This Court repeatedly has upheld over First Amendment objections regulatory schemes which restrict corporate communication so long as they do not discriminate against communications media. See, *e.g.*, *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103; *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Company*, 335 U.S. 525; *Lorain Journal Company* v. *United States*, 342 U.S. 143; *National Labor Relations Board* v. *Virginia Electric and Power Company*, 314 U.S. 469.

As noted, Section 610 is not directed against speech at all. It simply bars corporate political contributions, whatever their purpose—whether used to pay

the rent of a candidate's office or for a newspaper advertisement advocating his election. The effect of the statute upon the corporation's First Amendment rights is incidental. In view of the strong public interest in protecting the electoral process from the corrupting influence of the use of general corporate funds for political purposes, such incidential effects do not unconstitutionally abridge the corporation's First Amendment rights.

In *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, this Court recently upheld under the First Amendment the constitutionality of the prohibition in the Hatch Act against partisan political activity by federal employees. The Court's analysis and reasoning is equally applicable here.

The Court first essayed the history of attempts by Congress to insure "that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited" (*id.* at 557). The Court then held that the "balance [Congress] has so far struck," of barring partisan political activity by government employees while permitting them to participate fully in the electoral process, is "sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act" (*id.* at 564). The Court stated (*id.* at 567): "[n]either the right to associate nor the right to participate in political activities is absolute in any event. * * * *Nor are the management, financing, and conduct of political cam-*

paigns wholly free from government regulation" (footnote and citations omitted; emphasis supplied).

Section 610 similarly represents a "sustainable" balance, consistent with the First Amendment. Indeed, the Hatch Act—barring federal employees from all partisan political activity—entails a far more onerous restriction than Section 610, which imposes no restraints upon individuals acting alone or in groups. It merely restricts political contributions and expenditures by corporate entities *separate and apart* from the shareholders and officers of whom they are comprised. The Hatch Act, on the other hand, directly restrains the partisan political activities of individuals.

B. Section 610 is Neither Unconstitutionally Overbroad Nor Unconstitutionally Vague.

Contrary to petitioners' further contentions, Section 610 is neither unconstitutionally overbroad on its face nor unconstitutionally vague. Its proscription against contributions or expenditures made "in connection with any elections" comprehends a range of corporate conduct which is easily identifiable and well understood. The statutory scheme evidences the "precision of regulation" which this Court has said to be the "touchstone in an area so closely touching our most precious freedoms." *National Association for the Advancement of Colored People* v. *Button*, 371 U.S. 415, 438. The statute is a narrow prohibition precisely directed against the evil sought to be avoided—disproportionate corporate influence

over elections through political contributions—while permitting individuals associated with the corporation fully to exercise their First Amendment rights of speech and association.

This Court has repeatedly refused to strike down a statute as overbroad on its face where there were a substantial number of situations to which it could be validly applied. "Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute * * * covers a whole range of easily identifiable and constitutionally proscribable * * * conduct * * *'" (*Parker* v. *Levy*, 417 U.S. 733, 760, quoting from *Civil Service Commission* v. *Letter Carriers*, *supra*, 413 U.S. at 580-581). And as the Court recognized in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615, "where conduct and not merely speech is involved" the overbreadth must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

The provision in Section 610 barring contributions or expenditures made by corporations "in connection with any election" embraces a clear range of constitutionally proscribable conduct. While there could be marginal applications infringing upon First Amendment values—where, for example, corporate advertising dealt solely with issues and never impliedly referred to a candidate—such potential overbreadth is insubstantial in relation to the unquestionably valid scope of the statutory scheme.

The phrase "in connection with any election" is not impermissibly vague. The words define situations in which corporations might use their resources to influence the electoral process with as great precision as the nature of the subject matter permits. They reach a precise and readily ascertainable type of conduct, see *United States* v. *O'Brien*, *supra*, 391 U.S. at 381, and convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." *United States* v. *Petrillo*, 332 U.S. 1, 8.

In *Boyce Motor Lines* v. *United States*, 342 U.S. 337, the Court noted that because of the necessary imprecision of language, only a "reasonable degree of certainty can be demanded" of any legislation. As it observed:

> A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. [342 U.S. at 340; footnotes omitted.]

Moreover, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise" (*United States* v. *Harriss*, 347 U.S. 612, 618).

Here the statute is clear in prohibiting what was done in this case—the financing of public advertisements and pamphlets which criticized the views of one of the major candidates (referred to, but not named) in the 1972 presidential election. The company had financed political advertising—a direct "expenditure" made "in connection with" a presidential election. Petitioners were amply warned that their advertisement and pamphlet critical of a political candidate in all but name were within the boundary of proscribable conduct.

Moreover, the phrase "in connection with any election" derives meaning from the context in which it is used and the statutory design. The purpose of the statutory scheme is to control and limit corporate influence upon the electoral process. An expenditure or contribution is made "in connection with any election" if it is intended and designed to support or discredit a particular candidicy, that is, if one of its purposes is to urge and encourage the electorate to vote in a certain way. The words are given greater specificity by the remainder of

the statutory scheme, which exempts non-partisan registration and "get-out-the-vote" campaigns by a corporation aimed at its shareholders and any communications by a corporation to its stockholders and their families.

This Court has upheld, against vagueness challenges, phrases in other regulatory statutes implicating First Amendment rights that were no more definite and specific than the words "in connection with an election." See, *e.g.*, *United States* v. *Wurzbach*, 280 U.S. 396 (upholding the provision of the Federal Corrupt Practices Act prohibiting any person from receiving money "for any political purpose whatever"); and *United States* v. *Harriss*, *supra* (upholding the provision of the Federal Regulation of Lobbying Act prescribing certain requirements for any person who receives money "to be used principally to aid, or the principal purpose of which person is to aid" in "influenc[ing] directly or indirectly, the passage or defeat of any legislation by the Congress of the United States").

In *Civil Service Commission* v. *Letter Carriers*, *supra*, the Court upheld the constitutionality of the prohibition in the Hatch Act against federal employees "taking an active part in political management or in political campaigns." The Court stated, in words equally applicable to the instant case (413 U.S. at 577-579):

> There might be quibbles about the meaning of [language in the statute and regulations]; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

C. Section 610 Does Not Deny Equal Protection in Violation of the Fifth Amendment.

Petitioners contend that, in singling out corporations and labor unions, Section 610 denies equal protection in violation of the Due Process Clause of the Fifth Amendment. Petitioners maintain that Section 610 does not prohibit voluntary associations, partnerships or unincorporated organizations from making political contributions in connection with federal elections. But as this Court has held, Congress may act selectively, and a prohibition within its power directed at a particular class is not rendered invalid because it does not also reach every other class upon which Congress may constitutionally place similar restrictions. *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4; *United States* v. *Petrillo*, *supra*, 332 U.S. at 8-9; *Sproles* v. *Binford*, 286 U.S. 374, 396.

Moreover, it is rational to hold corporations and labor unions to a different and more stringent standard than other associations. "Congress may have considered that the volume or proportion of unincorporated business or the relatively small size of in-

dividually owned enterprises * * * made it possible to omit persons [in such entities] from duties and penalties imposed on artificial combinations of capital." *United States* v. *Morton Salt, supra*, 338 U.S. at 651. Indeed, as we have already stressed, Section 610 does not prohibit shareholder majorities from expressing their collective political sentiments through voluntary political organizations. Such voluntary associations, partnerships or unincorporated organizations simply do not pose the same possibility of disproportionate influence upon the electoral process as corporations or labor unions which are able to aggregate funds not otherwise volunteered for political purposes.

CONCLUSION

For the foregoing reasons, Section 610 is consistent with the First and Fifth Amendments.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1974

No. 73-1908

STEWART S. CORT, ET AL., *Petitioners,*

v.

RICHARD A. ASH.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America [hereinafter "Chamber"] respectfully requests leave from the Court to file a brief as *amicus curiae* pursuant to Rule 42.3 of the Rules of the Court. Counsel for the petitioners has consented to the filing of a brief *amicus curiae* by the Chamber; counsel for the respondent has declined consent.

This case involves the review of a decision by the United States Court of Appeals for the Third Circuit holding that a minority stockholder has an implied right of private action against corporate directors for alleged violations of § 610 of the Federal Election Campaign Act [hereinafter "Act"], 18 U.S.C. § 610 (1970) as amended 18 U.S.C. § 610 (Supp. II, 1972), a criminal statute prohibiting corporate campaign spending. *Ash* v. *Cort,* 496 F.2d 416 (3d Cir. 1974). The Third Circuit's decision reversed the district court's grant of summary judgment holding that no implied private right of action exists under § 610 of the Act. *Ash* v. *Cort,* 350 F. Supp. 227 (E.D. Pa. 1972) *denial of preliminary injunction affirmed,* 471 F.2d 811 (3rd Cir. 1973); *grant of summary judgment reversed,* 496 F.2d 416 (3d Cir. 1974).

The Chamber is a corporation organized and existing pursuant to the laws of the District of Columbia with principal offices at 1615 H Street, N.W., Washington, D.C. It represents over 47,000 businesses, 2700 local chambers of commerce, 42 state and regional chambers, 1000 trade and professional associations and 35 American chambers of commerce abroad. It has an underlying membership of over five million business firms and individuals.

Since its establishment in 1912, the Chamber has been deeply involved in activities concerning the business community and its role in the political process. In this regard the Chamber publishes a wide range of documents relating to public affairs including speeches, pamphlets and advertisements expressing business' view on governmental issues. The Chamber, as a corporation and as a representative of its member corporations, will be directly affected by the Court's decision.

The issues presented here affect the rights of corporate officials to make statements on behalf of a corporation and the right to distribute those statements. Thus, this case raises fundamental questions of the freedom of expression on public issues and the right of corporations to respond to false and misleading allegations made by political candidates.

Accordingly, the Chamber is vitally concerned with and would be immediately affected by a decision denying corporations the right to publish statements having only incidental, if any, impact on a particular candidate or political party.

In the opinion of Chamber and its members, questions are involved which must be afforded the broadest possible consideration. The critical questions of law upon which this case turns, and for which full deliberation is necessary are:

I. Can an implied private right of action be maintained under § 610 of the Federal Elections Campaign Act in the absence of any specific statutory provision or legislative intent indicating that such a right exists?

II. Is a corporation "actively electioneering" under § 610 of the Act, as construed by the relevant case law, when it attempts to refute the views of certain political candidates without naming those candidates and without declaring that a particular candidate or party should be elected or defeated?

III. If an implied private right of action exists and if the corporation's conduct is held to be within the scope of § 610, can the section withstand constitutional scrutiny under the First Amendment?

It is the opinion of the Chamber that the language of the Act compels, and its purpose will best be served by, a finding that the exclusive remedy under § 610 is criminal prosecution, and that statements published by a corporation which constitute expressions on public issues but do not refer to a particular candidate or political party are not within the scope of the Act.

Therefore, it is respectfully submitted that the Court grant leave for the filing of the attached brief by the Chamber of Commerce of the United States of America, as *amicus curiae,* in this case.

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December 26, 1974

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§ 14a, 15 U.S.C. § 7n(a) 16, 17
§ 27, 15 U.S.C. §78(aa) 16, 17, 19

OTHER AUTHORITIES

Note, *The First Amendment Overbreadth Doctrine* 83 HARV. L. REV. 844 (1970) 33

S. Rept. No. 92-96, 92d Cong., 1 Sess. (1971), 1972 U.S. Code Cong. Adm. News, 1773 14

S. Rept. 93-689, 93d. Cong., 2d Sess. 1 (1974) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1908

STEWART S. CORT, ET AL., *Petitioners,*

v.

RICHARD A. ASH

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America [hereinafter "Chamber"] respectfully submits this brief as *amicus curiae* because the important questions involved will affect its and its members participation in free and open expression on public issues. Motion for leave to file this brief has been timely presented to the Court pursuant to Rule 42.3.

STATEMENT OF INTEREST

The Chamber is a nonprofit corporation organized and existing under the laws of the District of Columbia, with its principal office at 1615 H Street, N.W., Washington, D.C. 20062.

The Chamber represents more than 3700 state and local chambers of commerce and trade associations with underlying membership of over five million business firms and individuals. Direct business memberships number in excess of 47,000, a great majority of which are corporations subject to § 610 of the Federal Election Campaign Act, 18 U.S.C. § 610 (1972).

The interest of the Chamber and its members stems from the potential impact of this case on their ability to speak freely on issues of vital national concern. The Chamber and its members are involved in a wide range of activities, such as delivering speeches, publishing pamphlets and books, and conducting seminars, which directly involve the discussion of government affairs. Thus, one of the basic functions of the Chamber is to express the point of view of the business community on a wide range of national public affairs matters. Another basic function is to inform and educate its members, and others as to these matters. Additionally, its members many of whom are business corporations, have participated in the exchange of ideas concerning public issues through statements of opinion and disseminations of fact. Matters of public concern, because they are of importance, seldom escape ventilation in political election campaigns. To the extent that this case questions the right of corporations to be heard on public issues, it goes to the heart of both of the Chamber's own operations and those of its members.

This case, far more than its antecedents before the Court *e.g., United States v. Congress of Industrial Organizations,* 335 U.S. 106 (1948) and *United States v. United Auto Workers,* 352 U.S. 567 (1957), rehearing denied, 353 U.S. 943, involves the interplay of First Amendment rights with Congressional efforts to control undue influence in federal campaigns through § 610 of the Federal Election Campaign Act, 18 U.S.C. § 610 [hereinafter "Act"]. It does not involve corporate contributions to a candidate's campaign treasury or corporate admonitions to vote for, or against a candidate. The alleged violations, sought to be tested in an unprecedented private civil action, were a speech by the Chairman of Bethlehem Steel Corporation, Stewart S. Cort, and a subsequent advertisement summarizing that speech. Stockholders and the public were urged by Cort to participate in the 1972 presidential election by carefully weighing each candidate's position and, if necessary, correcting false and misleading statements made by any political candidate. Incidental to this basic message, the speech and advertisement responded to misstatements of facts by several *unnamed* and *unidentifiable* candidates as to whether corporations were paying their fair share of taxes. The nature of the response was the publication of data concerning the amount of taxes actually paid by Bethlehem.

The U.S. Court of Appeals for the Third Circuit held that a private civil action could be maintained under § 610 and that the District Court erred in granting summary judgment for the defendants. *Ash v. Cort,* 496 F.2d 416 (3d Cir. 1974). If the Court of Appeals' decision is affirmed, the effect on the entire business community, as well as on our political system, will be to severely limit the free and open discussion

of public issues. Carried to its logical denouncement the position announced by the Court of Appeals would cause a corporation to act at its peril each time it exercised its right to be heard on a public issue, even, as in the present case, if this exercise is occasioned by a need to defend itself against false charges. By the same token, corporations, including the Chamber would, under the Court of Appeals' rationale, act at their peril in attempting to provide informational or educational services respecting public affairs questions. A more comprehensive, more wide-reaching dampening of the free interchange of ideas essential to the resolution of public issues could scarcely be devised.

This danger would, moreover, be seriously aggravated by the Court of Appeals majority's holding that private civil actions may be maintained under the Act. As to any important governmental question there are invariably a minimum of two points of view. There could hardly be a more effective way for those opposed to a corporation's point of view than to stifle it by initiating civil actions for both damages and injunctive relief. In short, a particular chilling effect on free expression will result from the fact that, under the appellate court's holding, legal action could be generated not by any motive to enforce the Act but solely by a divergence of viewpoint.

As an organization which itself speaks out on public issues and is a major national representative of a large number of business corporations who do the same, the Chamber is deeply interested in the outcome of this litigation.

SUMMARY OF ARGUMENT

I.

The question presented is whether statements made by an officer of a corporation refuting generalized charges by unnamed candidates for public office are contributions or expenditures within the meaning of §§ 591(f)(1) and 610 of the Federal Election Campaign Act [hereinafter "Act"], 18 U.S.C. §§ 591(f)(1) & 610 for which an implied private action may be maintained. This case does not involve the donation of corporate funds to the campaign treasuries of candidates for federal office. Rather it turns on the question of whether a corporation, regardless of size, may make statements in its own defense responding to what it considers to be the false and misleading allegations made by unnamed candidates without being subjected to private suits by shareholders or others who may hold divergent views.

On June 12, 1972, the Chairman of the Bethlehem Steel Corporation, Stewart S. Cort, made a speech to the Rotary Club in Jacksonville, Florida entitled "Speak Out For Truth".[1] In the speech Cort urged his listeners to weigh the record of the candidates running for elective office, to correct false statements whenever made, and to mobilize "truth squads" to encourage responsible, honest and truthful campaigning. Cort made several references in his speech to the types of statements he had found to be misleading or false. The references included statements by presidential candidates that business was not paying its fair share of taxes and that the "White House" would listen

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[1]The Speech is reprinted in Petitioners' Petition for Certiorari as Appendix I at A51–60.

to corporate chairmen but not the working man. Petitioners' Brief for Certiorari at A52-53.

Cort's response to these statements was that while it was reasonable to demand that corporations pay their fair share of taxes, the statements implied that corporations were not already doing so. Cort disclosed that Bethlehem had paid over $200 million in taxes for 1971. Petitioners' Petition for Certiorari at A52-53. In concluding his speech Cort urged his audience to analyze the candidates and the issues, and to correct faulty, ill-founded or misleading statements. Petitioners' Petition for Certiorari at A59. Subsequently, an advertisement, summarizing the speech, was placed by the Public Affairs Department of Bethlehem in national periodicals, and national and local newspapers from August 22, 1972 until September 7, 1972.[2] The advertisement stated that copies of the full speech and a folder on how to organize truth squads could be obtained from the Public Affairs Department of Bethlehem.[3]

Richard A. Ash, as a minority stockholder brought an action in the District Court for the Eastern District of Pennsylvania asserting that the speech, advertisement and folder were campaign contributions and expenditures within the meaning of §§ 591(f)(1) and 610 of the Act, 18 U.S.C. §§ 591(f)(1) and 610. The gravaman of Ash's complaint was that Bethlehem had expended money to help secure the election of the Republican 1972 presidential candidate.

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[2]The advertisement appeared in Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, The Washington Post, The Wall Street Journal and nineteen Bethlehem plant town newspapers. A copy of the advertisement is reprinted in Petitioners' Petition for Certiorari in Appendix H.

[3]Reprinted in Petitioners' Petition for Certiorari in Appendix J.

The District Court granted defendants motion to dismiss on the grounds that the court lacked jurisdiction, holding that no implied private right of action existed and that Cort's speech, which was ostensibly to mobilize and seek honest campaigns, was not within the coverage of § 610. *Ash v. Cort,* 350 F.2d 227 (1972). On appeal, the Third Circuit reversed the district court holding that an implied private right of action did exist for a minority stockholder under § 610 and further reversed the District Court's conclusion that the Cort speech did not on its face come within the purview of that section. *Ash v. Cort,* 496 F.2d 417 (3rd Cir. 1974).

The Federal Election Campaign Act in Title II, which includes § 610, provides criminal sanctions against corporations making expenditures which might unduly influence the nomination for election or the election of particular candidates or political parties in federal campaigns. In the two most recent reconsiderations of the Act, Congress failed to amend Title II to provide a private cause of action under § 610 but has provided for civil action under Title III. These recent enactments are a significant indication of Congressional intent since both have expressly been described as comprehensive overhauls of the Act. See text at 12-13, *infra.*

The Court has been confronted with an issue similar to that here presented in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453 (1974), which held that an implied right of action was not available. The court applied the well-established principle of statutory construction that when legislation expressly provides a particular remedy in one part, but not in another part of the same Act, the Court will not expand the coverage of a statute to subsume other remedies. This principle is reflected in the maxim—*expressio unius est exclusio*

alterius. In the instant case this principle is particularly pertinent since Congress in enacting Title III, as compared with Title II, specifically provided for civil actions for violations of the reporting requirements of the Act. Thus, the Act prescribes a comprehensive statutory scheme, with criminal penalties the sole remedy for Title II violations, and civil remedies authorized under Title III. See text 13-21, *infra.*

II

Assuming arguendo that a private action may be maintained, still at issue would be whether § 610 of the Act prohibits a corporation from attempting, in self-defense, to refute false and misleading statements made by certain candidates without naming those candidates and without declaring that a particular candidate or party should be elected or defeated. The right of corporations to respond to misleading statements directed at them by a political candidate is necessary to assure full robust public debate. See text 21-23, *infra.* Moreover, since the Court has held that legal action is unavailable against false statements by public figures, absence malice, *New York Times v. Sullivan,* 376 U.S. 254(1964), the only recourse available to a corporation is to enter the public debate. See text 23, *infra.*

Furthermore, for an expenditure or contribution to be proscribed under § 610, it must be given to unduly influence the election of a particular candidate or party in a federal election. The district court held Bethlehem's conduct did not constitute "active electioneering" within the meaning of § 610. 350 F.2d 277, 232. The Third Circuit in remanding the case for a determination of whether Bethlehem's conduct was within the

coverage of § 610 apparently misconstrued the district court's decision since the district court had already made that determination. 496 F.2d 416, 424-426. The speech in this case, however, was not given to unduly influence any election. Its primary purpose was to admonish stockholders and the public-at-large to carefully analyze the candidates and issues, and only incidentally thereto did it state the positions on unnamed candidates relative to business. The nexus between undue influence of an election and the acts herein alleged to be a violation of § 610 does not exist in this case. See text 24-29, *infra.* If Cort's actions are within the scope of § 610 then every position on any issue, major or minor, taken by a corporation during an election would be subject to the proscriptions of § 610. The Second Circuit's pronouncement in *United States v. National Committee for Impeachment,* 469 F.2d 1135 (2d Cir. 1972) is directly relevant:

> Such a result would, we think, be abhorent; the Government [or Ash in this case] fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributors, or the like. On the Government's thesis every little Audubon Society chapter would be a "political committee," for "environment" is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat "juvenile delinquency" or a Golden Age Club promoting "senior citizens' rights" would fall under the Act. The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable.
> 469 F.2d at 1142.

III.

If the Third Circuit decision is upheld, § 610 as applied by that court would be an unconstitutional infringement of First Amendment rights. Statutes which restrict free speech, similar to § 610, are presumed to be unconstitutional unless the statute narrowly defines the evil to be curbed with specificity. To hold that § 610 authorizes a private action to challenge speech which merely responds to allegations made by a political candidate is to broaden the coverage of § 610 beyond the limits necessary to control undue influence by corporations on federal elections. See text 29-31, *infra*.

Furthermore the creation of an implied private action would have a chilling effect on the right of free speech by corporate officers. Private actions, even if unsuccessful, would theaten the very ability of corporate officials to speek freely on any issue. The Chamber believes that § 610 as applied by the Third Circuit would force business to remain silent during primary or general elections for fear that any comments might be interpreted by even a few as having some influence on a political candidate or party. The criminal remedy provided in § 610 is sufficient to curb the evil against which the Section is aimed without unduly restraining free speech. The Chamber and its members will effectively be denied their First Amendment rights to engage in the unfettered and robust public debate if the Third Circuit's decision, implying a private right of action, is upheld. See text 31-38, *infra*.

I. An Implied Private Right Of Action Cannot Be Maintained Under Section 610 Of The Federal Election Campaign Act In The Absence Of Any Specific Statutory Provision Or Legislative Intent Indicating That Such A Right Is Created.

The pivotal issues in this case are whether an implied private right of action exists under the criminal provisions of 18 U.S.C. § 610 as amended by the Federal Election Campaign Act of 1971 [4], and whether such an

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[4] 18 U.S.C. §610 provides:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive contribution prohibited by this section.
>
> Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
>
> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services,

[Footnote continued on next page]

action can be maintained to restrain free expression by corporate executives on matters of public concern.

The history of the criminal sanctions against corporate expenditures in federal elections spans the twentieth century.[5] Directly relevant here Congress, in 1972 enacted a comprehensive statutory scheme codifying the previously existing criminal statutes.

In codifying and enlarging upon the criminal provisions Congress in Title II of the Act, which includes § 610, provided only for criminal sanctions. By contrast, Title III of the Act authorizes the Attorney General of the United States to bring *civil* actions to en-

or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) *to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section;* but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction. [emphasis supplied].

[5] The history of the federal controls on corporate campaign spending was traced in detail by Mr. Justice Frankfurter in United States v. United Automobile Workers, 352 U.S. 567, 570-584 (1957).

force that title's reporting requirements. 2 U.S.C. § 438(d)(1)(1972).[6]

The Court has considered similar statutory frameworks and has concluded that a private cause of action could not be implied. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974) [hereinafter *"Amtrack"*]; *T.I.M.E. Inc.* v. *United States,* 359 U.S. 464 (1959); and *Botany Worsted Mills* v. *United States,* 278 U.S. 282 (1929).

In *Amtrak,* the Court held that to imply a private right of action would undercut the very purpose of the Rail Passenger Service Act of 1970, 45 U.S.C. § 501 *et seq.* (1970). The holding was based on an examination of the relevant section of the Rail Passenger Service Act, general principles of statutory construc-

[6] The relevant sections of Title III of the Federal Election Campaign Act provide:

> Any person who believes a violation of this title has occurred may file a complaint with the supervisory officer. If the supervisory officer determines there is substantial reason to believe such a violation has occurred, he shall expeditiously make an investigation, which shall also include an investigation of reports and statements filed by the complainant if he is a candidate, of the matter complained of. Whenever in the judgment of the supervisory officer, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this title or any regulation or order issued thereunder, the Attorney General on behalf of the United States shall institute a civil action for relief, including a permanent or temporary injunction, restraining order or any other appropriate order in the district court of the United States for the district in which the person is found, resides or transacts business upon a proper showing that such person has engaged or is about to engage in such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond by such court. 2 U.S.C. § 438(d)(1) (1974).

tion, and the legislative history, which supported a conclusion that the Act vested exclusive authority in the Attorney General (except in cases involving labor agreements) for the enforcement of its provisions.

Similarly the legislative history of the Federal Election Campaign Act supports the conclusion that Congress intended the criminal remedies under § 610 to be *exclusive*. Although § 610 was amended in 1972 to expand the definition of political expenditures and contributions, Congress did not expand the coverage to authorize civil causes of action. See, S. Rept. No. 92-96, 92d Cong., 1st Sess. (1971); 1972 U.S. Code Cong. & Admin. News, 1773.

Lower court cases are consistent with the principles denying an implied private right of action and at odds with the Third Circuit majority's holding. For example, in *Holloway* v. *Bristol-Meyer Corp.*, 485 F.2d 986 (D.C. Cir. 1973), the court of appeals upheld the district court's holding that the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52 and 54 did not created a private right of action.[7] The court was

[7] *See also,* Daly v. Columbia Broadcasting System, Inc., 309 F.2d 83 (7th Cir. 1962) denying a private suit by a mayoral candidate for compensatory and exemplary damages resulting from a radio station's violation of the "equal time" provisions of the Act. *But see,* Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) where the Court held that when constitutional rights are infringed upon, such as Fourth Amendment rights it will be more willing to imply a private right to protect those constitutional rights. Application of Bivens, *supra,* in this case would require an analysis and balancing of constitutional issues which is inapplicable here since Ash is not claiming his cause of action arises under the Constitution. In point of fact, this case involves the converse of Bivens since to imply a private right here would raise serious questions concerning Cort's and Bethlehem's First Amendment rights. See text at 29-33, *infra.*

guided by the legislative history of the Act which provided for government enforcement as the exclusive remedy.

Reversal of the Third Circuit's construction of § 610 is further mandated by the principle of statutory construction, announced by the Court in *Amtrack, supra,* 414 U.S. at 458. That principle holds that when legislation expressly provides a particular remedy, courts should not expand the coverage of the statute to subsume other remedies, particularly where another title or section of an Act specifically provides the remedy in question for a separate and distinct offense. The reasoning of Judge Aldisert, in his dissent to the Third Circuit's decision, tracks that principle. Judge Aldisert concluded:

> A legislative schema [sic] expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar "principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*" *Ash* v. *Cort,* 496 F.2d 416, 428 (3rd Cir. 1974).

See also, *Calhoon* v. *Harvey,* 359 U.S. 464 (1959); *Fleishman Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 720 (1967); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951); *Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297, 301 (1943).

The Third Circuit relied upon two major arguments to support an implied private right of action against Bethlehem. The Chamber believes both are inapposite. The first ground relied upon by the Third Circuit rested upon Mr. Justice Clark's opinion in *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 431-432 (1964) wherein an implied civil remedy was read into the criminal sections of the Securities Exchange Act even though the remedy was not expressly provided for by Congress. The second ground erroneously relied upon by the Third Circuit was that stockholders were expressly intended by Congress to be afforded a cause of action. This assertion takes as its precedent Mr. Justice Rutledge's concurring opinion in *United States* v. *Congress of Industrial Organizations,* 335 U.S. 106, 134-135 (1948) wherein he declared that one of the Federal Election Campaign Act's purposes was "... to protect union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views". 335 U.S. at 134.

In *J. I. Case Co.* v. *Borak, supra,* the Court was confronted with a stockholder's derivative suit charging deprivation of pre-emptive rights and breach of the directors' fiduciary duty resulting from violations of § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 74n(a). 377 U.S. at 427. In holding that an implied private cause of action exists under the Securities & Exchange Act of 1934, the Court was aided by § 27 of the Securities Act which, unlike any section relevant to § 610, granted the district courts

general equity jurisdiction to enforce that Act.[8] Mr. Justice Clark concluded:

> It appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act. *Indeed, this section specifically grants the appropriate District Courts jurisdiction over all suits in equity and actions at law brought to enforce any liability or duty created under the Act.* 377 U.S. at 430-431. [Emphasis supplied].

The court was further persuaded that a private right of action existed because § 14(a) of the Securities Exchange Act of 1934 expressly delegated to the Securities and Exchange Commission the authority to promulgate regulations to protect investors. Justice Clark declared:

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[8] Section 27 of the Securities and Exchange Act of 1934 provides:

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts. 15 U.S.C. § 78aa (1974).

> These broad remedial purposes are evidenced in the language of the section which makes it "unlawful for any person . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest *or for the protection of investors*". [Emphasis supplied by the Court]. While this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors", which certainly implies the availability of judicial relief where necessary to achieve that result. 377 U.S. at 431-432.

The rationale of *J. I. Case* v. *Borak, supra,* is plainly distinguishable from the instant case since § 610 of the Federal Election Campaign Act does not grant to the district courts jurisdiction over suits in equity or at law to enforce its provisions.

The Third Circuit's second ground for supporting an implied private right of action relates to language in Mr. Justice Rutledge's decision in *United States* v. *CIO, supra,* to the effect that one of the purposes of the Act was the protection of minority union members from being coerced to contribute to a candidate or party against their wishes. At least two important reasons militate against reading Mr. Justice Rutledge's concurring opinion in *United States* v. *CIO, supra,* as creating a private right of action in corporate shareholders. First in *United States* v. *United Auto Workers, supra,* the Court after considering the objectives of the Act as articulated by Mr. Justice Rutledge, chose the objective of preventing of undue influence rather than protecting minority views as the

primary consideration upon which violations of the Act were to be judged. 352 U.S. at 588-89.

Second, consideration of corporate expenditures has been the subject of Congressional enactments since 1907. Throughout this period, Congress has had ample opportunity to create a private right of action or at least enact provisions similar to § 27 of the Securities Exchange Act of 1934. It is significant to note that in both the consideration of the Federal Election Campaign Act of 1971 and the Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 93d Cong., 2d Sess. (1974), Congress has amended the criminal provisions but has neither acted nor commented on private rights of action.

In commenting on the purpose of the 1974 Amendments, the Senate Report states:

> This recommended legislation is a comprehensive and far-reaching measure, designed to bring together various laws already enacted or passed by the Senate, for the purpose of providing complete control over and disclosure of campaign contributions and expenditures in campaigns for Federal elective office, including all public funds which any candidate may be entitled to receive prior to and after the date of any election. S. Rep. No. 93-689, 93rd Cong., 2d Sess. 1 (1974).

The net effect of implying a private right of action would be to judicially expand § 610's coverage in areas where Congress with ample opportunity has failed to legislate for over sixty years. Such a broadening of § 610 would permit every dissident stockholder to challenge the corporation whenever it speaks out on public issues during an election. The resulting chilling effect on free speech would force corporations to limit and

censor all statements on public affair issues or risk private penalties. Moreover, the multiplicity of suits which would arise would subject corporate directors to constant harassment and would require them to account for each exercise of speech involving governmental affairs. In our complex political system where government and business are by necessity so closely related, every public statement would be open to challenge if the Third Circuit is upheld.

The chilling effect on the exercise of these constitutionally protected rights is strikingly lessened if under § 610, penalties are assessed in actions initiated by government prosecutors rather than individuals who may find themselves in disagreement with a particular corporate expression.

Criminal sanctions, as the exclusive means of enforcing § 610, permits free expression by corporate executives while effectively curbing the corruption of federal elections by contributions or expenditures. Criminal sanctions, centrally enforced by the Department of Justice, fosters the development of a uniform enforcement policy, thus giving corporate executives reasonable notice of what is and is not within § 610's coverage. To permit private actions on the other hand, would cause the diffusion of standards. While this result may be a characteristic of civil litigation in general, where First Amendment rights are involved, certainty of the Act's scope is absolutely necessary if free speech is to be protected.

When the benefits of an implied private right of action are balanced against the chilling effect on First Amendment rights, the Court must refuse to imply a private right under § 610. If a private right of action

is created by the Court, then the question arises as to how any meaningful line can be drawn which protects First Amendment rights. The Chamber believes the answer is that no such line can be drawn since the mere creation of a private right alone will immediately threaten free speech by corporate executives.

II. A Corporation Is Not "Actively Electioneering" Under The Act, As Construed By The Relevant Case Law, When It Defends Itself Against Charges By Refuting Candidates Statements Without Naming Those Candidates And Without Declaring That A Particular Candidate Or Party Should Be Elected Or Defeated.

Assuming Cort's activities were questioned in the proper proceeding, it would be necessary to determine whether a corporation may reply in self-defense, to false and misleading statements made by political candidates in federal elections without violating § 610 of the Act. At the outset a fundamental distinction must be drawn between acts which unduly influence the election of a particular candidate from acts which seek to correct misleading or false statements having at most only an incidental, if any, impact on particular candidates.

Cort's speech had two major purposes: (1) to encourage non-partisan participation in the elective process, and (2) to respond to erroneous statements made against corporations. The first purpose, encouraging non-partisan participation, is clearly not within the scope of § 610. See, *United States* v. *CIO, supra; United States* v. *United Auto Workers, supra; United States* v. *Lewis Foods,* 366 F.2d 710 (9th Cir. 1966) reversing 236 F.Supp. 849 (S.D. Cal. 1964), on remand from 381 U.S. 908 (1965); and *United States* v. *National Committee for Impeachment* 469 F.2d 1135 (2d

Cir. 1972). Thus, the only action of Bethlehem's which is even arguably within the scope of the Act is Cort's brief response to allegations by unnamed candidates that corporations, such as Bethlehem, were not paying their fair share of taxes.

The right of a corporation to respond to what it believes are misleading statements by a political candidates is one of first impression for the Court. None of the cases which have analyzed § 610 have confronted a situation in which a corporation has been forced to defend itself against allegations that it was operating in a manner detrimental to the public good. The legislative history is devoid of any discussion on this subject.

The Court's rationale in upholding the basic right to respond in other areas involving political campaigns is however instructive on the issue of whether a corporation has the right to respond under § 610.

The right to respond *to issues* raised in a campaign was considered by this court in *Mills* v. *Alabama,* 384 U.S. 214 (2966), wherein an Alabama statute prohibiting the publication of editorials on election day was struck down as violative of the constitutional protection of free speech and press. While *Mills* involves the freedom of press, it has a direct bearing on the instant case. Cf., *Red Lion Broadcasting* v. *Federal Communications Commission,* 395 U.S. 367 (1969) establishing the right to reply in the television medium under the "fairness doctrine".

Similarly, the Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) permitted the publication of an advertisement responding to allegations that certain undesirable conditions existed in Montgomery, Alabama. In enunciating the rule that public figures shall not be subject to libel actions, except where actual malice is shown, 376 U.S. at 283, the Court held:

> That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need * * * to survive," N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405, was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, 76 U.S.App. D.C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544.

Since a publicly held corporation is in essence a "public figure," and, since absent malice a tort action is not available, Bethlehem's sole recourse against misleading statements by a political candidate is to enter the debate. As the Court in *New York Times* v. *Sullivan* announced:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehemently sharp attacks on governmental officials. 376 U.S. at 270.

Must a corporation stand idly by, muted from making any responses whatsoever to what it feels are misleading and false statements or can it enter the public debate? Surely if sharp attacks on governmental officials are protected under *New York Times* v. *Sullivan, supra,* then under the same rationale generic statements by a corporate officer on economic issues must also be protected under that same rationale.

The only remaining question is whether or not the corporate statement was made to unduly influence the election or whether it was merely participation in the free exchange of ideas. In this case there can be no doubt that Cort's speech and the advertisement summarized that speech were, on their face, in the latter category. Candidiates to whom statements were attributed by Cort were neither named nor were any identifying statements attached. This type of participation in debate is far removed from the type of activity covered by § 610 which only proscribes "active electioneering" on behalf of a particular candidate. *United States* v. *Auto Workers, supra.*

In discussing the application of § 304 of the Taft-Hartley Act, which was later codified into 18 U.S.C. § 610, Senator Taft stated that the Act proscribed those contributions or expenditures which were made to a particular candidate. Senator Taft stated in the Congressional debates:

> [I]n each case the question is whether or not a union or a corporation is making a contribution or expenditure to elect A as against B. 93 Cong. Red. 6439-6440, reported in 352 U.S. at 587, n. 1.

Furthermore, the cases construing § 610 hold that a contribution or expenditure is outside the scope of the section's prohibition if it is made for activites not considered "active electioneering". *United States* v. *United Auto Workers, supra; United States* v. *Lewis Food Company, Inc., supra; United States* v. *Anchorage Central Labor Council,* 193 F.Supp. 504, 507 (D. Alaska 1961); *United States* v. *The National Committee for Impeachment, supra.* In *United States* v. *Auto-*

workers, supra, the Court held that only corporate and union expenditures for particular candidates or political parties were proscribed by § 610. Mr. Justice Frankfurter, for the court, declared:

> The evil at which Congress has struck in § 313 [forerunner to § 610] is the use of corporation or union funds to influence the public at large to vote *for a particular candidate or particular party.* 352 U.S. at 589. [Emphasis supplied]

Lower courts in examining the scope of § 610 have taken as their pivotal concern the question posed by Justice Frankfurter in *United Auto Workers, supra:* "Did it [the questioned activity] constitute active electioneering or simply state the record of particular candidates on economic issues?" 352 U.S. at 592.

In *United States* v. *Lewis Food Company, Inc.,* supra, the district court applied the "active electioneering" test to find that a corporate advertisement setting forth the records of federal and state candidates on "votes cast in favor of constitutional principles" fell in the same category as publishing candidates' records on economic issues, which *United States* v. *United Auto Workers* found permissible. The advertisement found to be outside the scope of § 610 in *United States* v. *Lewis Foods, supra,* was carried in thirty-five newspapers throughout the state of California. In dismissing the indictment the court held:

> . . . [A]n expenditure by a labor union [or corporation] does not come within the purview of the statute if it is not for an activity which constitutes active electioneering but is merely for a publication which simply states the record of particular candidates on economic issues.
> . . . .

> The Court is of the view that the voting record of said candidates "in favor of constitutional principles" is in the same category as the records of candidates on economic issues. The advertisement does not constitute active electioneering. It merely states the voting records of said candidates "in favor of constitutional principles." Obviously, it was not an attempt to control the election. 236 F. Supp. at 853.

The Ninth Circuit, after remand by the Supreme Court, 381 U.S. 908 (1965), did not take issue with the district court's determination that an expenditure did not come within the Act's purview if it was not for "active electioneering". 366 F.2d 710, 712.

Similarly the "active electioneering" test was applied in *United States* v. *The National Committee for Impeachment, supra,* to an advertisement calling for the impeachment of President Nixon because of his Vietnam policy. The advertisement which carried a list of members of Congress supporting such impeachment,was found by the Court to be permissible under § 610. The advertisement in *National Committee* contained the following statement:

> The National Committee for Impeachment will devote its resources in funds and publicity in aid of any new candidate for election to the House of Representatives or re-election of an incumbent Member, whether in a primary contest or the actual election contest, whether Republican, Democrat, Independent or a new party, in the order in which their names are officially printed in the Congressional Record. 469 F.2d at 1138.

The court held that since the "major purpose" of the advertisement was the impeachment of the President and not the nomination or election of candidates, the

expenditure did not violate § 610 of the Act. 469 F.2d at 1141-1142. See also, *United States* v. *Painters Union,* 172 F.2d 854 (2d Cir. 1949); *United States* v. *Anchorage Central Labor Council, supra.* Application of the "major purposes" test enunciated in *National Committee, supra,* to this case would result in the speech and advertisement being held clearly outside the ambit of § 610. The major purpose of the questioned material was the encouragement of non-partisan involvement in an election; not the endorsement of a particular candidate or party.

More importantly the court in *National Committee* recognized the intolerable consequences which would result if it held that the Committee's advertisement was within the perview of the Act:

> We dispose more readily of the Government's suggestion that the Act applies to the National Committee because—quoting from the affidavit supporting its motion for a preliminary injunction—"with respect to the upcoming election for President and Vice-President of the United States, the National Committee derogates President Nixon's stand on a principal campaign issue—the Vietnam war." On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with. Such a result would, we think, be abhorrent; the Government fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributors, or the like. On the Government's thesis every little Audubon

> Society chapter would be a "political committee," for "environment" is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat "juvenile delinquency" or a Golden Age Club promoting "senior citizens' rights" would fall under the Act. The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable. 469 F.2d 1135, 1142. [citations omitted].

In enacting the Federal Election Campaign Act of 1971, Congress merely codified the judicial construction previously given to § 610 by expressly recognizing that the touchstone is whether the funds are used for active electioneering. 117 Cong. Rec. H11477 (Nov. 30, 1971) (remarks by Congresman Hansen). See also, *Pipefitters Local 562* v. *United States,* 407 U.S. 385, 411-412 (1972).

Thus, there are two criteria for determining whether an advertisement is within the scope of § 610:

> First, was the expenditure for the purpose of influencing the public-at-large to nominate for election or elect a particular candidate or particular party. *United Auto Workers, Supra,* at 589.
>
> Second, was the expenditure or contribution made *on behalf* of or *to* a candidate, campaign committee or political party or organization.[9]

In each of the foregoing cases the conduct which the Court held not violative of § 610 more resembled "active electioneering" than does Cort's speech. In the instant case no candidate was named. No candidate's record was cited, even though under *United States* v. *United Auto Workers, supra,* such would be permissible. In fact the major purpose of the speech was a nonpartisan appeal for stockholders in particular and other voters in general to examine the record of all candidates. Only incidental to this major purpose did Cort refer to allegations by unnamed candidates regarding statements which he felt were untrue. Moreover, the speech and advertisement were not made on behalf of any particular candidate or organization. There is no indication in the record that any direct or indirect expenditure was made to a candidate or political party. Bethlehem's sole objective was to participate in the deliberation of public issues. Bethlehem's actions foster the ends which the Court in *New York Times* v. *Sullivan, supra,* found protected by the First Amendment. Thus, under the "major purpose" doctrine developed by the courts and supported by the Act's legislative history, it is clear that Bethlehem's actions were not within the purview of § 610.

[9] *See* note 4 *supra* at para. 4.

III. As Applied By The Third Circuit § 610 Of The Federal Elections Campaign Act Is Unconstitutional Under the First Amendment.

A determination of the constitutionality of § 610 becomes necessary if the Court finds that a private right of action can be maintained under the facts of this case. In *United States* v. *CIO, supra* and *United States* v. *Auto Workers, supra,* the Court has expressed gave doubts on the constitutionality of § 610.

Mr. Justice Rutledge correctly identified the constitutional issue in his concurring opinion in *United States* v. *CIO:*

> We are concerned in this case with the constitutionality of § 313 [predecessor to § 610] as

amended only insofar as it may be applied in restriction or abridgment of the rights of freedom of speech, press and assembly secured by the First Amendment. Other applications are not in question. There can be little doubt of Congress' power to regulate the making of political contributions and expenditures by labor unions, as well as by other organizations and individuals, in the interest of free and pure elections and the prevention of official corruption, by apropriate measures not trenching on those basic rights. But when regulation or prohibition touches them, this Court is duty bound to examine the restrictions and to decide in its own independent judgment whether they are abridged within the Amendment's meaning. 335 U.S. at 139-140.

A statute restricting First Amendment freedoms must be narrowly construed to meet the precise evil Congress sought to curb. *United States* v. *Harriss,* 347 U.S. 612 (1954); *United States* v. *Rumely,* 345 U.S. 41 (1953); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Schneider* v. *State,* 308 U.S. 147 (1939); *DeJonge* v. *Oregon,* 299 U.S. 353 (1937). The Court in *United States* v. *Harriss, supra,* confronted similar issues in construing the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270. The Court held that the Lobbying Act to avoid constitutional infirmity must be narrowly construed to cover only those cases where the alleged violation has as a main purpose the actual influence of a Member of Congress.

Furthermore, the Court has established a presumption against the constitutionality of legislation limiting freedom of speech, press and assembly guaranteed by the First Amendment. *Thomas* v. *Collins,* 323 U.S.

516 (1945); *Thornhill* v. *Alabama, supra; Schneider* v. *State, supra.*

Resolution of the issue of the constitutionality of § 610 requires a balancing of the evil to be curbed, (undue influence exerted on the elective process through expenditures and contributions by corporations to or on behalf of particular candidates or parties) against the possible infringement of the constitutional rights of free speech. *United States* v. *CIO, supra,* at 146. *Wisconsin* v. *Yoder,* 405 U.S. 205, 215 (1972); *Roth* v. *United States,* 354 U.S. 476 (1957); *Stromberg* v. *California,* 283 U.S. 359 (1931); *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963).

Cort's speech and the subsequent advertisement had as their primary purpose the encouragement of nonpartisan participation in the electoral process. Incidental to this purpose, Cort briefly responded to several generalized charges made against business. If corporate dissemination of this speech is unprotected by the First Amendment, then the delicate balance has been tipped—§ 610 no longer narrowly defines those evils which Congress sought to control. If § 610 is held to cover Cort's speech and the advertisement, then the attempted proscription would subsume constitutional rights of free speech. Fundamental to the free exchange of political thought is the right to speak out without the threat of legal restraints, governmental or private.

To permit a minority stockholder to maintain an implied private action in this case would be to put every corporate executive and every corporate member of the Chamber under the constant threat that individuals who oppose their views could commence

private suits. At a minimum this threat and possible harassment would dampen corporate willingness to participate in public debate. The mere possibility that a speech or advertisement of only incidental influence on a political campaign could create civil liability, both for damages and injunctive relief, on the part of corporate executives would effectively silence the voice of business on all issues. Attempted invocation of prior restraints to silence a corporate officer is amply demonstrated by Ash's attempt to secure a preliminary injunction against the distribution of Cort's speech and the advertisement prior to the 1972 presidential election. *Ash* v. *Cort,* 350 F.Supp. 227 (E. D. Pa. 1972) *denial of preliminary injunction affirmed* 471 F.2d 811 (3rd Cir. 1973). While the district court and court of appeals denied preliminary injunctions in this case, the threat exists that other courts under similar circumstances might issue such injunctive relief which the Court has held would constitute an unconstitutional prior restraint of speech. *New York Times* v. *United States,* 403 U.S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963). As Mr. Justice Brennan announced in *New York Times* v. *United States, supra,* only in extraordinary circumstances will the Court sustain a prior restraint of speech. In denying the government request for injunctive relief, Mr. Justice Brennan defined the extraordinary exception as the ". . . single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the nation is at war . . . ." 403 U.S. at 726.

In the final analysis, the possibility that published statements, which do not have as their principal purpose the undue influence of an election may give rise to private causes of action has a chilling effect upon free speech. *New York Times* v. *United States, supra; Dombrowski* v. *Pfister,* 380 U.S. 479, 494 (1965); but see, *Laird* v. *Tulun,* 408 U.S. 1 (1972). See also. Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 852-858 (1970).

It is the opinion of the Chamber that § 610 as applied by the Third Circuit will effectively prevent the business community from speaking out on important public issues . In today's world, the discussion of every issue involving a corporation touches in some way the political process. To expand the scope of § 610, by implying a private right of action, will open the floodgates to a multiplicity of suits, which even if unsuccessful, would threaten the very ability of corporate officials to speak freelly and openly on important issues. Such an expansion of § 610 is contrary to what the Court in *New York Times* v. *Sullivan* found to the ". . . profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open". 376 U.S. at 270-271.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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December 26, 1974

MOTION FILED

FEB 6 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1908

STEWART S. CORT, *ET AL.*,

Petitioners,

v.

RICHARD A. ASH, on behalf of himself and on behalf of BETHLEHEM STEEL CORP.,

Respondent.

On Writ of Certiorari to United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF FOR *AMICI CURIAE* Judith Bonderman, *et al.*, Urging Affirmance

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Judith Bonderman, George R. and Jane L. Berdes, Gordon McKinley, and Clifford Thomas hereby move, pursuant to Rule 42.3 of this Court, for leave to file a brief as *amici curiae*, urging affirmance of the decision of the Court of Appeals. Counsel for respondent has consented to the filing; counsel for petitioners has refused to consent but has stated no reason for doing so.

Mrs. Bonderman and Mr. and Mrs. Berdes are shareholders of Minnesota Mining and Manufacturing Co. ("3M") and Ashland Oil Co., respectively. Both of these companies were

among the fifteen corporations which have to date been found guilty of violating 18 U.S.C. §610 in connection with the 1972 Presidential campaign. As more fully described in the portion of the attached brief setting forth the interest of *amici*, both corporations sustained substantial damages as a result of illegal corporate contributions. In both cases the damages were far larger than the amount of the single contribution which was the basis of the original charge, and *amici's* actions led to partial repayments to both companies from responsible corporate officials. However, there are large additional amounts of damages flowing from violations of section 610 which are as yet unresolved, and thus *amici* have a financial stake in the outcome of this case, since the ability of 3M and Ashland to recover those damages will be materially enhanced if the decision below is affirmed.

The *amici* Gordon McKinley and Clifford Thomas are members of local Teamster unions whose employment contracts require all employees to join and pay dues to the union. If the validity of section 610 is not upheld, it is very likely that a portion of their dues will be contributed to candidates for federal elections whom they do not support, and it will be done with no recourse on their part other than to resign their jobs. Equally important for them is an affirmance of the right of minority stockholders and union members to recover damages for the corporation or union, since it is their belief that criminal sanctions alone have not and will not deter officials from misapplying the monies of others in violation of section 610, but that the threat of a civil damage action will help to deter such conduct.

On December 26, 1974, the Chamber of Commerce of the United States of America (the "Chamber") sought

leave to file a brief *amicus curiae* supporting petitioners, and on January 13, 1975, this Court granted that request. Although both the motion of the Chamber (p. 3) and the statement of its interest in the brief (p. 2) assert that the primary interest of the Chamber is in reaffirming the right of corporations to speak out on public issues without fear of violating section 610, almost half of the argument in the brief is devoted to the question of an implied cause of action under section 610. Similarly, although the brief emphasizes that this case "does not involve corporate contributions to a candidate's campaign treasury . . ." (p. 3), the Chamber's position with respect to a damage action based on section 610 in this case would also apply where cash was expended from corporate treasuries, as occurred with both 3M and Ashland. This Court, having granted the Chamber leave to file a brief supporting petitioners, should grant this motion and permit *amici* Judith Bonderman, *et al.*, to file their brief supporting respondent.

Respectfully submitted,

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BRIEF FOR *AMICI CURIAE* Judith Bonderman, et al., Urging Affirmance

INTERESTS OF *AMICI*

(1) Judith Bonderman is the holder of 150 shares of the common stock of Minnesota Mining and Manufacturing Co. ("3M"). On October 17, 1973, 3M and its chairman were charged with, and pled guilty to, violations of 18 U.S.C. §610 on account of a single $30,000 cash contribution

made from the funds of 3M to the reelection campaign of then President Richard Nixon. They were fined the sums of $3,000 and $500, respectively. Although the $30,000 contribution had previously been returned to 3M, the company had sustained other substantial damages resulting from the illegal contribution, and Mrs. Bonderman wrote the Board of Directors of 3M asking it to seek recovery of those damages. After the Board refused to take any action, Mrs. Bonderman filed suit in the United States District Court for the District of Minnesota (civil action 3-74-108).

At the time that the complaint was filed, the only publicly disclosed contribution was the one which was the subject of the criminal charges. During the course of discovery, however, Mrs. Bonderman learned that the company had expended more than $500,000 in its own funds for political purposes in violation of 18 U.S.C. §610 and similar provisions of Minnesota law. All of this information had been available to the Board of 3M, but it had refused even to attempt to recover the money from the responsible persons, who were primarily high corporate officers. On January 30, 1975, a stipulation of settlement was filed, providing for the payment of $475,000 back to the company from various present and former officials. On that date, 3M and several of its officers entered also into a consent decree with the Securities and Exchange Commission, which related to the subject matter of 3M's illegal corporate contributions and was brought about largely through Mrs. Bonderman calling the matter to the attention of the SEC.

Settlement of the derivative suit involving 3M must still be approved by the court, pursuant to Rule 23.1,

F.R.C.P. Even if approved, Mrs. Bonderman has an interest in seeing that the decision below in this case is affirmed because the settlement expressly excluded from its coverage such damages as may have been sustained by the corporation resulting from violations of the Internal Revenue Code related to or arising from the violations of section 610. These include criminal charges that have been brought against 3M and two of its former officers, as well as possible civil fraud penalities under 26 U.S.C. §6653(b). Accordingly, the ability of 3M to obtain reimbursement of such damages, to the extent that they may ultimately occur, will be significantly enhanced if the decision below is sustained.

(2) *Amici* George R. and Jane L. Berdes are joint owners of 66 shares of Ashland Oil, Co. which in November 1973 was convicted of a violation of 18 U.S.C. §610, as was its chairman. Following that conviction, a letter was sent on behalf of Mr. and Mrs. Berdes to the Board of Ashland asking the Board to recover from its chairman the fine, the legal expenses, and interest on the $100,000 that had been unlawfully contributed, as well as certain other damages. After the full repayment of the enumerated items of damages (totalling almost $20,000), the Berdes determined not to proceed further. Only recently, however, Ashland was charged with five additional violations of 18 U.S.C. §610, and it was disclosed publicly for the first time that an additional $533,000 had been unlawfully contributed to political campaigns. The Board of Ashland is awaiting a report from a Special Committee recommending a course of action regarding these matters, but if no action is taken to effect a recovery, *amici* Berdes may commence a derivative action. The right of Ashland — or its stockholders on behalf of the company — to recover these

additional contributions, the $25,000 fine levied on account of the five additional charges, as well as other damages will be significantly aided by an affirmance of the lower court's decision here.

In this connection it is important to note that the principal allegation of a violation of section 610 in this case involves the improper use of corporate monies for political advertisement, whereas the cases of *amici* Bonderman and Berdes involve cash contributions made from the funds of 3M and Ashland, respectively.[1] Thus, whatever problems of vagueness there are in section 610, as they apply to the advertisement in the instant case, it is important in deciding this case to keep in mind that the typical section 610 case involves a direct cash contribution. In such cases there is generally no problem of statutory construction, no arguable defense of vagueness, and the claim that a political contribution is a form of speech protected under the First Amendment is significantly different than when pure speech is at issue. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

(3) *Amici* Gordon McKinley and Clifford Thomas are both members of local Teamster unions (#24 and #182, respectively), and are required to join the union and pay dues as a condition of continued employment. Although neither the locals nor the international union are known to have made any political contributions to candidates for federal elections, that situation is likely to change

[1] Paragraph 13 of the amended complaint, however, does allege that petitioners' plan included the "expenditure of [Bethlehem's] funds in connection with the 1972 United States presidential election." (Appendix 72).

should the decision below be reversed. Without section 610 as a bar to political contributions, or without a threat of damage claims as well as criminal charges, it seems likely that the union would make contributions in Federal elections.[2] In such an event, the effect of a political gift would be a compulsory contribution by the union members to candidates of whom they might well disapprove. As this Court recognized in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 406 (1972), the prohibitions against corporations and labor unions arising out of section 610 are "exactly parallel", and thus a decision adverse to respondent, as a minority stockholder, would necessarily adversely affect the interests of *amici* McKinley and Thomas, as dissenting union members.

ARGUMENT

I. THE DECISION BELOW IS CORRECT AND OFFICIALS RESPONSIBLE FOR VIOLATIONS OF 18 U.S.C. §610 MUST REIMBURSE THEIR PRINCIPALS FOR LOSSES RESULTING FROM SUCH VIOLATIONS.

A. The Basic Principles Involved.

The fundamental difficulty with the portion of petitioners' brief dealing with the liability of the responsible officials is that it has turned the rule of law on its head and has created burdens which this Court has never imposed on a

[2] Article VI Section 9 of the International Constitution already gives the General President the authority to make contributions for political candidates if such contributions are not prohibited by state, provincial, or local law.

plaintiff seeking to rely for his cause of action on a violation of substantive law. We do not propose to discuss the cases which have been thoroughly analyzed in the brief of respondent and that of the *amicus* Common Cause. In our view, those authorities, in particular *Wyandotte Transportation Co. v. United States,* 389 U.S. 191 (1967), and the recent excellent discussion in *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974), establish the proposition that a violation of a regulatory or criminal statute gives rise to an action for damages on behalf of those persons who are intended to be protected by the statute, unless there are contrary indications in the statutory scheme itself and the legislative history. While the overall impression petitioners seek to convey is that the case in which an action for damages will lie is the exception, the authorities demonstrate that the general rule is precisely the opposite.

Therefore, it is necessary to examine each case to determine, first, whether those asserting claims arising from the statutory violation are within the class of persons intended to be protected by the substantive rule of law, and then whether there are any contrary indications that would preclude the relief being sought. Two decisions of this Court recognized that among the classes of persons within the protection of section 610 are those represented by respondent and *amici* — dissenting shareholders and union members. Thus, in *United States v. CIO,* 335 U.S. 106, 113 (1948), this Court stated that section 610 was partially motivated by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." And *Pipefitters Local Union No. 562 v. United States, supra,* set forth at great length the numerous

instances in the legislative history of section 610 in which Congress indicated deep concern with the rights of individual union members not to have the majority spend their funds for political purposes without their consent. See 407 U.S. at 402-431. Finally, in the debates preceding the 1971 amendments to the federal election laws, the same reasons were given in support of this prohibition as previously acknowledged:

> A corporation cannot give money to a political campaign, and the basic reason why that law was passed was that they could not represent the total views of their stockholders. The stockholders might be opposed to the candidate they would support. 117 *Cong. Rec.* 29330 (Aug. 4, 1971) (Remarks of Senator Goldwater).

> [S]ection 610 . . . represents a complete victory for those who believe that corporations and unions have no moral right to utilize their organizations' general funds for active public partisan politicking. It totally subordinates organizational interests to individual interest.
>
> * * *
>
> [T]he underlying theory of section 610 is that substantial general purpose treasuries should not be diverted to political purposes, both because of the effect on the political process and out of concern for the dissenting member or stockholder. 117 *Cong Rec.* 43380-81 (Nov. 30, 1971) (Remarks of Representative Hansen).

Accordingly, we submit that the only remaining question is whether there are any contrary indications in section

610, or related provisions of law, of the kind found by this Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453 (1974) ("*Amtrak*"), which persuaded this Court to hold that the relief sought there was not available. After a thorough analysis of the purposes, statutory framework, and legislative history in *Amtrak*, this Court concluded to permit the plaintiff to sue for the very relief which the Attorney General had authority, but chose not to seek, would positively frustrate the objectives of the statute, and thus the action could not be maintained. In our view, the rationale in *Amtrak* is similar to the concept of exclusive jurisdiction over certain subjects by federal administrative agencies. For example, in cases such as *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963), this Court has denied the plaintiff the right to proceed under the antitrust laws, because to permit such a suit might cause a collision of the kind that Congress sought to avoid by assigning regulatory responsibility to the agency not the courts. Just as this Court ruled in *Pan Am* that the Civil Aeronautics Board ought to be left to decide whether a certain practice constituted unfair methods of competition under the Federal Aviation Act, so in *Amtrak* this Court concluded that the Attorney General was the proper person to determine whether the activities challenged in *Amtrak* should be subject to judicial review under the Amtrak statute.

It is essential in analyzing the impact of the *Amtrak* decision to recall that the plaintiff there did not ask for damages, but only injunctive relief of the very kind which the Attorney General might have, but had not sought to obtain. On the other hand, there is no problem of conflicting jurisdictions in this case since the only relief at issue

here is the recovery of monetary damages which resulted from past violations of section 610. Thus, when the relief claimed is different from (but not inconsistent with) that which the agency can provide, there is no preemption of the kind found in *Amtrak.* See *Georgia v. Pennsylvania Ry. Co.,* 324 U.S. 439, 460 (1945), and *S.S.W., Inc. v. Air Transport Ass'n. of America,* 191 F.2d 658, 664 (D.C. Cir. 1951), *cert. denied,* 343 U.S. 955 (1952).

B. The 1971 and 1974 Election Law Amendments Have No Bearing On This Case

Petitioners claim to have discovered a statutory intent to preclude damage actions under section 610 in the Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3, and the Federal Election Campaign Act Amendments of 1974, Public Law 93-43, 88 Stat. 1263, enacted October 15, 1974. In our view, neither of those provisions in any way limits the right of stockholders or union members to obtain recovery of damages from those who have violated section 610. In neither case was section 610 itself amended to preclude a damage action of the kind involved here, nor can petitioners point to any other provision of law in existence prior to 1971 which limits a right of action under section 610, similar to what this Court found in *Amtrak.* Therefore, petitioners are left to argue that the other amendments made by Congress in 1971 and 1974 were intended in some way to eliminate the existing right of minority shareholders and union members to recover damages for 610 violations. Given the undisputed fact that both amendments were designed to aid the cause of campaign reform, it is no small wonder that petitioners have failed to point to any provision in the legislative history that indicates any intent to diminish the

rights of any person to recover monetary losses sustained by violations of section 610.

Equally important, the particular provisions cited by petitioners simply do not reflect any Congressional intent to eliminate a private right of action under section 610. Thus, section 308(d)(1) of the 1971 amendments relied on by petititoners, 2 U.S.C. §438(d)(1), provides that the Attorney General may institute a civil action for relief for violations of 2 U.S.C. §§432-442. Petitioners suggest that the failure to *include* any civil damage actions for violation of section 610 indicates a Congressional intent to *preclude* such actions. However, petitioners overlook the fact that the provisions they cite deal with violations of the laws relating to campaign disclosures and are in a different Title from section 610, which has nothing to do with disclosure but establishes an absolute prohibition against political contributions by corporations and labor unions. Given the fact that Congress expressly confined the reach of 2 U.S.C. §438(d) to certain other provisions in Title 2, U.S. Code — thus excluding section 610, which is in Title 18, U.S. Code — suggests very strongly that Congress simply was not attempting to deal in any way with private rights of action with respect to section 610.[3]

[3] Furthermore, this case is not at all like *Amtrak*, where the very statute granting the Attorney General the right to seek the same relief which the plaintiff sought, also gave another class of plaintiffs a similar but narrower right to obtain that relief. That limited specific grant of a right of action to persons other than the plaintiff in *Amtrak* was a significant factor in the Court's conclusion that Congress had carefully considered who should be permitted to come into court and had specifically decided not to allow persons with the interest of the plaintiff (i.e. passengers) to take the railroad to court.

In short, the 1971 amendments are simply irrelevant to this question.

Petitioners also rely on the 1974 federal election law amendments, principally the addition of section 314 which, although much more detailed, is similar in thrust to section 308 of the 1971 amendments discussed above.[4] Petitioners focus on subsection (a)(7), which authorizes the Attorney General to institute a civil action for relief from violations of the 1974 Act and of various provisions of Title 18, including section 610. Citing this provision, as well as a statement by Congressman Wayne Hays that the subsection was intended to eliminate potentially abusive private suits during election campaigns, petitioners contend that Congress "preempted" the field and assigned to the Attorney General all the civil law enforcement functions relating to violations of section 610.

While this argument has a certain superficial appeal, further analysis demonstrates that it is in error. Initially, it should be observed that subsection (a)(7) speaks of relief in terms of a "permanent or temporary injunction, restraining order, or any other appropriate order . . . ." The entire thrust of that provision, as well as the remainder of section 314, is directed at injunctive-type relief, and there is no suggestion anywhere that the phrase "other appropriate order" was intended to assign to the Attorney General the responsibility for recovering damages for corporations or labor organizations for violations of section

[4] In this regard it should be noted that both sections give rights to "any persons" whereas the claims asserted here are only those of dissenting stockholders and union members.

610. There is not a single mention of a damage action at any place in the legislative history, a particularly telling absence in view of the fact that, under the preemption view taken by petitioners, the Attorney General would be responsible for obtaining damage recoveries for all section 610 violations. There is nowhere the slightest suggestion of the need for public financing for what are essentially private lawsuits, and this Court should not lightly assume that Congress intended the Attorney General to enter a field to the exclusion of all private parties where there is no compelling reason for Congress to have assigned that duty to him. This Court need not decide whether the Attorney General could seek to attempt to recover such damages under the authority of decisions such as *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); what this Court must decide is whether Congress intended to assign the full and exclusive responsibility for recovering damages arising out of section 610 violations to the Attorney General.

Moreover, petitioners' argument approves too much, since it would preclude both corporations and unions, as well as dissenting stockholders and union members, from bringing actions against their faithless officers who spend corporate or union funds for partisan political purposes. There is not the slightest reason to believe that Congress intended such a result, yet it is clear that it necessarily flows from petitioners' preemption argument. Finally, section 403 of Title III specifically provides that the 1974 law supersedes and preempts any inconsistent provision of state law "with respect to election to Federal office." Taking petitioners' argument as to preemption under section 314 at face value, and coupling that argument with the preemption provisions of section 403, it would appear that not only had the

protection of rights to recover monetary damages for violations of section 610 been assigned to the Attorney General, but that the states could not even *permit* shareholders or union members to recover such damages since that would be inconsistent with the assignment of that responsibility exclusively to the Attorney General.[5] Once again there is no reason to suspect that Congress had any such intention, thereby further demonstrating that the preemption suggested by petitioners simply does not exist.

In fact, the answer to all of the arguments with respect to the 1971 and 1974 amendments is that those laws simply do not deal with, and were never intended to relate to, the right to recover damages for a violation of 18 U.S.C. §610. Since petitioners apparently concede that there was no prohibition on such recovery prior to 1971, and since they have pointed to nothing in the 1971 or 1974 amendments or their legislative history directly dealing with the question of damage recovery, their preemption arguments must fail.

C. Sound Policy Reasons Support the Decision Below

There are important policy considerations that also support the decision of the Third Circuit. As the 3M and Ashland situations described above graphically demonstrate, there is no substitute for minority shareholder suits to redress violations of section 610 where the wrongdoers are corporate insiders. The Special Prosecutor's office, the

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[5] In his dissent below, Judge Aldisert considered this to be "a garden variety" state court derivative suit, but not a federal cause of action [A. 149]. Thus, the position of petitioners' is far more restrictive than the dissent on which they so heavily rely.

Department of Justice, the newly created, but as yet inactive Federal Election Commission, and the Securities and Exchange Commission cannot perform these functions even if they have the authority to do so. Those organizations have other tasks, and there is ample evidence that, but for the role of private parties, these and many other violations of section 610 would have gone unremedied. *Cf., J. I. Case Co. v. Borak,* 377 U.S. 426, 432-433 (1964).

The right to relief under section 610 is particular important for dissenting union members who are often, as is the case for the *amici* McKinley and Thomas, compelled to pay dues, and but for section 610, a portion of their mandatory dues payments would be given to candidates whom they might well oppose. The right to a pro rata refund for money spent for political purposes, recognized by this Court's decisions in *International Ass'n of Machinists v. Street,* 367 U.S. 740 (1961), and *Brotherhood of Railway Clerks v. Allen,* 373 U.S. 113 (1963), is primarily based on an interpretation of the Railway Labor Act, in light of the First Amendment problems that might exist if individuals were forced to pay union dues that were used in part to support candidates not of their own choosing.[6] In cases where a union shop is required by contract but not specifically authorized by statute, the state action is different from that involved in *Allen* and *Street,* and the First Amendment right is much less clear. Therefore, the prohibition against campaign contributions in section 610

[6] This right extends only to those who specifically ask for their refund, thereby burdening those who wish to dissent by causing them to be placed in a directly and openly antagonistic position to union leadership. In addition, the administrative difficulties in providing this limited remedy are considerable, and there is no reason to extend those problems to cases covered by the direct bar of section 610.

should be held to entitle any union member to bring suit to recover for that union all damages resulting from a 610 violation, and the matter should not be left to individual union members to recoup their shares of the damages sustained.

A further basis for supporting the decision below is that there are important federal rights involved here, and the federal courts should be available to protect them. With jurisdiction under 28 U.S.C. §1331, the $10,000 amount in controversy requirement will prevent a burdening of the courts with smaller cases, while at the same time insuring that a federal forum will entertain claims alleging significant violations of federal rights. However, because of the relative ease of obtaining diversity of citizenship jurisdiction under 28 U.S.C. §1332 in stockholders' derivative suits, and the not significantly greater impediment in cases involving labor union violations of 610, it is likely that these cases will be in the federal courts even if the plaintiff is forced to rely on state, rather than federally created, rights.

The advantage of suing on a claim based on a violation of section 610 is, thus, not in the increased access to the federal courts, but in the increased likelihood of a recovery that will make the corporation or union nearly whole. For instance, without the absolute prohibition of section 610, it is possible that the defense of a "good faith" intention to act in the best interests of the company would be available in a suit brought on a theory of corporate waste. See *Hornstein v. Paramount Pictures Co., Inc.,* 22 Misc. 2d 996, 37 N.Y.S. 2d 404 (Sup. Ct. N.Y. Cty. 1942), *aff'd,* 292 N.Y. 468, 55 N.E. 2d 740 (1944). And if that defense were allowed, it would be very difficult to disprove a claim by the responsible officials that they thought they

were acting in the best interests of the company in making the contribution.

Second, under the so-called "business judgment" rule, the decision of disinterested members of the board of directors not to sue is a formidable defense to a derivative action. See *Ash v. International Business Machines, Inc.*, 353 F.2d 491 (3rd Cir. 1965), *cert. denied*, 384 U.S. 927 (1966). By virtue of the absolute prohibition of section 610, the corporate board's discretion to decline suit must be severely confined, lest it circumvent the prohibition of section 610 under the guise of the business judgment rule, a result which Congress could not have intended. The consequence of precluding damage claims under section 610, however, would be to substantially strengthen the business judgment defense, which would run counter to the intent of Congress in enacting this strict provision. Other adverse consequences to dissenting stockholders and union members, such as the imposition of state statutes of limitations in lieu of the federal doctrine of laches, and the requirement of posting security for costs,[7] would also result from a holding reversing the lower court in this case. Furthermore, the fine paid by the corporation, the legal fees necessarily attendant upon such criminal proceedings, and the damages resulting from the income tax consequences of the way in which the corporation attempted to hide the illegal contribution on its books, might not be recoverable under a theory of corporate waste.

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[7] In fact, respondent's common law claim was dismissed after petitioners obtained an order requiring the posting of security for costs as to that cause of action (Brief of petitioners, p. 12).

Given the powerful instrument of a cause of action under section 610, every instance of illegal campaign contributions involving the 1972 Presidential campaign of which counsel for *amici* is aware has been settled either before suit by a repayment of out-of-pocket damages by the responsible individuals at their own or at the Board's insistence, or has resulted in a substantial in-court settlement after suit was filed. Section 610 was clearly intended to protect the rights of dissenting stockholders and union members, and this Court should therefore affirm the decision of the Third Circuit in this regard.

II. THIS COURT SHOULD NOT DECIDE THE CONSTITUTIONAL QUESTIONS RAISED BY PETITIONERS RELATIVE TO SECTION 610 AT THIS TIME

There has been no trial in this case. The court below simply held that the question of whether an advertisement paid for by corporate funds, which criticizes a clearly-identifiable but unnamed, candidate, is "active electioneering" in favor of that candidate's opponent, is a question of fact which must be determined at a trial. If the factual determination is resolved against respondent, the courts need proceed no further, and the case will be concluded. Only if that question is resolved in respondent's favor would it be necessary for the difficult First Amendment question to be reached. Accordingly, under established principles, this Court should not reach that question at this time. In addition, with respect to future determinations of this kind, it appears that the newly created Federal Election Commission may well rule on interpretations of this kind under its primary jurisdiction, see Remarks of Representative Brademas, 120 Cong. Rec. H. 10328 (daily ed. Oct. 10, 1974), and it will only

be after that determination is made that this or any other court would be required to consider the matter further.

Should the Court determine to reach the constitutional question, *amici* urge this Court to hold that section 610 is constitutional, both as applied in this case, and most clearly when direct cash contributions are made from corporate or union funds.[8] Petitioners emphasize the congressional purpose of limiting the effect of large corporate and union gifts in federal elections in considering the constitutionality of section 610, while virtually ignoring[9] the other entirely proper purpose which the Court has noted so often — to prevent the use of shareholders'/members' money to support candidates whom they do not support. See pp. 6-7, *supra*. With this congressional purpose to support section 610, the First Amendment arguments of petitioners are reduced to a claim that, as a matter of constitutional law, Congress had to adopt the complex individual refund scheme provided in *Street* and *Allen*, *supra*, rather than achieving that end by prohibiting direct corporate or union contributions. Even judged by the least restrictive alternative test which is applied to cases involving pure speech,[10] we submit that section 610 validly achieves this purpose without violating the First Amendment.

[8] The prohibition on "expenditures" other than cash is obviously intended to insure that gifts in kind are not used to avoid the reach of section 610, and the constitutionality of the limitation on free speech should be considered in that light.

[9] The only reference is at page 71 of petitioners brief, and that in the context of speaking out on public issues and not in spending the money invested by shareholders.

[10] *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Compare *United States v. O'Brien*, 391 U.S. 367, 376 (1968), where non-speech is also involved.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1908

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION, and

BETHLEHEM STEEL CORPORATION,

Petitioners

v.

RICHARD A. ASH, On Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, Common Cause moves the Court for leave to file the appended brief *amicus curiae* supporting the position of respondent. The consent of the parties to file such brief has been sought and was given by respondent* but refused by petitioners.

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* A copy of respondent's consent is being filed herewith.

On January 13, 1975, the United States Chamber of Commerce was granted leave to file an *amicus curiae* brief in support of petitioners.

Common Cause is a non-profit District of Columbia corporation, organized to promote on a nonpartisan basis social welfare and civil betterment in the United States. Among its major purposes is to facilitate achievement of these objectives by making government more responsive to public needs and demands through reform of the political processes. It has in excess of 300,000 dues-paying members in the several states and the District of Columbia. Its membership includes citizens of the United States who have been and intend to be: (a) registered voters for election of candidates for federal elective office; (b) contributors of lawful amounts to political committees which accept contributions and make expenditures for the purpose of influencing the election of candidates for federal elective office; (c) active participants in support of the election of candidates for federal elective office.

Common Cause members lobby their Senators and Representatives and are represented before legislative bodies by Common Cause, which is registered as a lobbying organization pursuant to the Federal Regulation of Lobbying Act. In its efforts to protect the interests of its members in a fair and open political process, Common Cause has filed a number of lawsuits directed at securing full compliance with laws regulating the conduct of those in the political arena. The doctrine of implied civil remedies has been a central issue in several of those cases. In *Common Cause* v. *Democratic National Committee*, 333 F. Supp. 803 (D.D.C. 1971), a district court inferred a private right of action on behalf of Common Cause members for the enforcement of 18 U.S.C. §§ 608 and 609. In that case, Common Cause sued to prevent the Democratic, Republican, and Conservative Party committees from evading the statutory limits on contributions and expenditures for federal election campaigns. In another case, a district court inferred a private right of action for the enforcement of the disclosure provisions of the Corrupt Practices Act of 1925, 43 Stat. 1070, *Common Cause* v. *Finance Committee to Re-Elect the President*, CA 1780-72 (D.D.C., filed 1972). In that case, Common Cause, on June 24, 1973, secured an order compel-

ling the defendant to comply with the statutory provisions governing disclosure of campaign contributions and expenditures. As a result of that lawsuit, secret sources of over $20,000,000 in contributions in the 1972 Presidential campaign were made public. These disclosures, which revealed a continuing pattern of illegality, gave impetus to both judicial and legislative efforts to cleanse the electoral process. Attorneys for Common Cause are currently engaged in another such action, *Common Cause* v. *National Association of Manufacturers*, CA 74-1114 (D.D.C., filed July 25, 1974), in which the plaintiffs seek to compel compliance with the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261 *et seq.* In that case, Common Cause asserts the interests of registered voters, of constituents of Members of Congress, and of registered lobbyists. It claims that the defendant's failure to comply with the Act's registration requirements constitutes an injury to its interest in the integrity of the legislative process. The outcome of the instant case may well, as a practical matter, determine whether Common Cause will be able to secure compliance with the Lobbying Act.

This case is of great importance to the future of Common Cause's ability to sue to compel compliance with statutes enacted to protect the class of persons which includes Common Cause members, and thus should be decided only after careful consideration of the views of Common Cause, which will certainly be affected by the disposition of this case.

The position taken in Common Cause's brief is that the doctrine of implied civil remedies has a long history in our law, and that the reasons for the rule's evolution compel its application in this case. In addition, we suggest that the key to the doctrine, as established by this Court, is the need for civil relief to ensure compliance with law. It is our position that, with regard to legislation safeguarding the integrity of the political process, including 18 U.S.C. § 610, public enforcement efforts have been negligible, and a private right of action is essential to the effectiveness of such statutes.

This position, which is more fully discussed in our brief, has not been and is unlikely to be briefed by the parties. We believe that it is desirable for the Court to have before it expositions of all the relevant considerations before it decides under what circumstances private rights of action can be inferred from criminal statutes. The brief of Common Cause will discuss in detail the shortcomings of public enforcement, an issue that is otherwise unlikely to be presented, and it is primarily to bring this issue before the Court that leave to file a brief *amicus curiae*, urging affirmance, is sought.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1908

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION, and

BETHLEHEM STEEL CORPORATION,

Petitioners

v.

RICHARD A. ASH, On Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is stated in the motion, *ante*, for leave to file this *amicus* brief.

SUMMARY OF ARGUMENT

The court of appeals correctly held that shareholders of a corporation whose funds have been expended in violation of

18 U.S.C. §610 have an implied civil cause of action against the responsible corporate officials.

A. There is a long history of precedents for the proposition that penal statutes may by implication authorize private civil remedies for their violation. The doctrine, an ancient one with roots in the common law, is based on the fundamental general principle that wherever there is a legal right there is a legal remedy if the right is infringed. In this country, the history of the doctrine, under the leadership of this Court, has been one of expanding use. In its earliest application, the doctrine was used primarily in tort actions: the common law provided the basis for the claim and the statute supplied the standard of conduct. This Court first recognized the doctrine in such a case. *Texas & Pacific Railway* v. *Rigsby*, 241 U.S. 33 (1916). Sustaining a suit for damages brought by a railroad employee who had suffered injuries as a consequence of the railroad's failure to comply with a statutory duty, the Court enunciated as follows (citing the common law) the applicable principle: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied * * * " (241 U.S. at 39-40).

In its more modern application, the doctrine has been used where a statute creates a new right: the statute makes certain behavior unlawful and the court fashions a civil remedy for an aggrieved member of the class for whose protection the statute was enacted. Federal courts have adopted this approach in a wide variety of situations.

B. In its more recent decisions applying the doctrine—*J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), and *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969)—this Court has enunciated three basic criteria for determining whether a private civil remedy is impliedly authorized by a criminal enactment: (1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether the injury

suffered is of the type the statute was intended to protect against, and (3) whether the remedies explicitly prescribed are adequate to ensure full effectuation of the Act's purposes. Under these tests the present proceeding is a proper one for applying the doctrine. Respondent, as a registered voter and corporate shareholder, is within the classes which §610 was designed to protect. Since its enactment in 1907, the prohibition against corporate political contributions has been designed to protect both the rightful claim of the electorate to the allegiance of their elected representatives, by destroying the influence over elections which corporations would be able to exercise through financial contributions, and the right of shareholders to have their invested funds used solely for legitimate business purposes. The harm suffered by respondent is precisely the harm which §610 was intended to prevent. Corporate funds (the suit alleges) were used to influence public opinion in favor of a particular candidate, and respondent's share of the funds was used without his consent to aid a candidate whom he did not support. Finally, unless respondent is entitled to the relief he seeks, the statute's broad remedial purposes will not be effectuated.

C. The third of the mentioned criteria—whether the expressly provided criminal sanction will suffice to ensure full effectuation of the statute's purposes—is particularly pertinent in the case of an enactment, like §610, that is designed to preserve the integrity of the electoral process. Effective criminal enforcement of such statutes would concededly go a long way toward achievement of their remedial goals. The generally acknowledged and widely deplored fact is, however, that campaign financing laws, "corrupt practices" enactments, and similar statutes designed to maintain the purity of elections have rarely been criminally enforced. The reason is that an incumbent Attorney General has an obvious conflict of interest in investigating or prosecuting campaign violations by members of his own Administration or party. And because of the "live and let live" principle of elective politics in countries like the United States in which there are frequent transfers of power,

the same conflict of interest affects cases involving members of the opposition party. Hence, unless laws of this type are construed as authorizing private civil remedies for their violation, they will not be effectively enforced at all—and will become to all intents and purposes "dead letters".

D. There are no countervailing reasons for not inferring a civil remedy here.

1. Petitioners' and Judge Aldisert's reliance on the rule of construction *"Expressio unius est exclusio alterius"*, as the basis for their conclusion that Congress intended that violation of §610 should be civilly irredressable, is misplaced. They rely on the fact that Congress, in Title III of the Federal Election Campaign Act of 1971 ("FECA"), provided an express civil remedy for violation of that Title's substantive provisions, but in Title II, though it amended §610, did not similarly provide a civil remedy for breach of it. But Title III, which made no reference to § 610, was a comprehensive, carefully integrated, and largely new set of provisions relating to the reporting and disclosure of campaign contributions and expenditures. The sole provision claimed to be relevant created a public civil remedy (a suit by the Attorney General) for violation of the Title's substantive directives. Title II, on the other hand, did not purport to establish any comprehensive, or new, or self-contained body of rules on any subject. It merely amended in various respects, as its caption indicates it was designed to, a miscellany of Criminal Code sections. Its sole alleged pertinence lies in the fact that § 610 was one of the sections so amended—the amendment consisting of the addition of a new paragraph codifying existing case law as to the meaning of a phrase used in the Section. Since the amendment of § 610 which Title II effected was in no way concerned with considerations relating to remedies or remediability, there is simply no warrant for the view that Congress meant to imply by anything said in the Titles that there should be no civil remedy for violation of § 610.

2. Nothing in the Federal Election Campaign Act Amendments of 1974 ("FECA Amendments") reinforces the claim, based on the *expressio unius* maxim, that Congress meant that violation of § 610 should be civilly irremediable. Indeed the FECA Amendments (which are inapplicable to this lawsuit because they were enacted after the court of appeals' decision) tend to refute rather than bolster that claim. The 1974 Amendments, so far as relevant, in effect extended the public civil remedy provisions of Title III of the 1971 Act to cover violations of § 610 (and certain other Criminal Code sections) as well as to violations of the 1971 Act proper. This hardly suggests that Congress, in 1971, in enacting Titles II and III, impliedly intended that violations of § 610 were to be civilly irredressable—the basic *expressio unius* argument. The more reasonable inference is that Congress, in 1971, simply did not consider § 610 from the standpoint of remedies or remediability; and that later, in 1974, when it addressed the specific issue, it decided to make the civil remedy provisions of Title III of the 1971 Act applicable to violations of § 610 as well.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT SHAREHOLDERS OF A CORPORATION WHOSE FUNDS HAVE BEEN UNLAWFULLY EXPENDED IN VIOLATION OF 18 U.S.C. § 610 HAVE AN IMPLIED CIVIL CAUSE OF ACTION AGAINST THE RESPONSIBLE CORPORATE OFFICIALS

Introductory Note

This brief is addressed solely to the issue of whether the court of appeals erred in determining that a private civil cause of action is impliedly created by 18 U.S.C. § 610. Although petitioners seek this Court's determination of both the scope and the constitutionality of § 610, the Court should decline to address those questions at this time.

The pleadings in this case do not provide an adequate basis on which to determine whether the advertisement in question involved an illegal "expenditure" within the meaning of § 610.

It is true that this Court has twice ruled on the coverage of this and its predecessor statute. *United States* v. *C.I.O.*, 335 U.S. 106 (1948); *United States* v. *Auto Workers*, 352 U.S. 567 (1957). But those were criminal cases, and the indictments were drawn with the particularity due process requires. The case at bar is civil, and the pleadings provide only an outline of how the litigation will proceed. As this Court has noted:

> Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the [Federal] Rules [of Civil Procedure] to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

Conley v. *Gibson*, 355 U.S. 41, 47-48 (1957). Without pretrial discovery and a factual adjudication in the district court, it will not be possible for this Court to decide whether petitioners' actions violated the statute or whether the statute is constitutional.

Important questions are unanswered at this stage in the litigation. Was the advertisement in question paid for by the petitioners at the suggestion or request of a candidate or his staff? Was the advertisement intended to influence voters either for or against a political candidate? In an age of sophisticated public relations, the Court must look beyond the face of the advertisement, which admittedly mentions no names and contains no pictures of individual candidates. These questions are highly relevant to both the scope and constitutionality of § 610. For this Court to decide those issues at this early stage of the proceeding would be tantamount to issuing an advisory opinion, in contravention of the settled constitutional rule prohibiting such opinions.

This Court faced a similar situation in *United States* v. *Auto Workers*, *supra*, where the Court found § 610 to apply to the conduct alleged in the indictment, but declined to decide the statute's constitutionality. Mr. Justice Frankfurter wrote for the Court:

> The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against passing on the validity of an Act of Congress "unless absolutely necessary to a decision of the case." [citation omitted]
>
> * * * * * * * * * *
>
> Refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case. First of all, these questions come to us unillumined by the consideration of a single judge—we are asked to decide them in the first instance. Again, only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision. Finally, by remanding the case for trial, it may well be that the Court will not be called upon to pass on the questions now raised. * * *

Id. at 590-592. By declining to rule now on the scope and constitutionality of § 610, the Court may avoid the necessity of such a ruling entirely or may postpone the ruling until a more complete record is available. This course would be in keeping with the long-standing tradition of this Court. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345 (1936) (Mr. Justice Brandeis, concurring).

A. There Is a Long History of Precedents for the Proposition That Penal Statutes May Authorize Private Civil Actions by Implication

The doctrine of implied civil remedies is based on the " 'general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.' " *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) (quoting with approval 3 Blackstone, *Commentaries*, 23); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). This reservoir of judicial power stems from jurisdiction over a case and from an allegation that a legislatively protected interest has been disregarded. The doctrine is an ancient one, with roots in the common law. Cf. *Anonymous*, 6 Mod. 26, 87 Eng. Rep. 791 (Q.B. 1703); *Couch* v. *Steel*, 3 E. & B. 402, 118 Eng. Rep. 1193

(Q.B. 1854); 1 Com. Dig., *tit.* Action upon Statute (F), 318 (4th ed. 1800). Thus Chief Justice Holt ruled in *Anonymous, supra,* that:

> [W]herever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute * * *.

6 Mod. at 26-27, 87 Eng. Rep. at 791. And in *Couch* v. *Steel, supra,* it was held that a seaman who had been injured because a shipowner had failed to comply with a statute that required certain medicines to be kept on board ship was entitled to sue civilly for damages, notwithstanding that the statute made the default a penal offense and made no provision for a civil remedy by one hurt by it. "Upon principle then, as well as upon authority, as far as we have been able to find any upon the point," the court concluded (citing, *inter alia,* Comyns' *Digest, supra* [which in turn had invoked the authority of *Anonymous, supra*]),

> we think * * * that the plaintiff's right, by the common law, to maintain an action on the case for special damage sustained by the breach of a public duty is not taken away by reason of the statute which creates the duty imposing a penalty * * *.

3 E. & B. at 415, 118 Eng. Rep. at 1198.

In this country, the history of the doctrine, under the aegis of this Court, has been one of expanding use.[1] In its earliest application, the doctrine was used primarily in tort actions. In theory, the common law provided a basis for the claim, and the statute merely supplied a required standard of conduct. This Court first recognized the doctrine in such a case. *Texas & Pacific Railway* v. *Rigsby,* 241 U.S. 33 (1916). Considering a suit for damages brought by a railroad employee who had

[1] For a discussion of the modern English precedents in the field, see Williams, *The Effect of Penal Legislation in the Law of Tort,* 23 Mod. L. Rev. 233 (1960).

been injured in falling from one of the company's cars, the Court noted that under the Federal Safety Appliance Act all such cars were required to be equipped with secure handholds or "grab irons" and that a defect in such equipment had caused the injury in question. To the railroad's argument that violation of the statutory requirements, even if applicable in this instance, would subject the railroad only to the penal provisions of the Act and not to civil liability, the Court, harkening back to tort law principles, held that a cause of action would lie:

> None of the Acts [the basic Safety Appliance Act and later amendments of it], indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted.

Id. at 39. In essence, the Court found that the statute designated both a class of potential plaintiffs and a standard of care which was owed to such individuals in the operation of the railroad, and articulated, as follows, the basic applicable principle:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law * * * [citing Comyns, *supra,* and *Anonymous, supra*]. This is but an application of the maxim, *Ubi jus ibi remedium* [citing, *inter alia, Couch* v. *Steel, supra*].

Id. at 39-40. See also *Neiswonger* v. *Goodyear Tire & Rubber Co.,* 35 F.2d 761 (N.D. Ohio 1929) (private suit based upon violation of regulations promulgated under the Air Commerce Act of 1926, establishing lawful flying altitudes); *Roosevelt Field* v. *Town of North Hempstead,* 84 F.Supp. 456 (E.D.N.Y. 1949) (private suit based upon violation of Civil Aeronautics Board regulations for construction of water tanks). And see American Law Institute, *Restatement of Torts,* § 286 (1934).

In its more modern application, the doctrine of implied civil remedies has been used where a statute creates a new right. In effect, the statute declares certain behavior unlawful, and the court fashions a civil remedy, for the benefit of the suing member of the class of persons intended to be protected, in addition to the legislatively prescribed remedies (if any) to enforce the right created. As Judge Friendly stated in *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178, 182 (2d Cir.), certiorari denied, 385 U.S. 817 (1966), "The case for implication would be strongest when the rule imposes an explicit duty unknown to the common law." Federal courts have followed this approach in a wide variety of situations.

In *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930), this Court inferred a cause of action from a provision of the Railway Labor Act of 1926 which prohibited coercion in the selection of bargaining representatives in labor negotiations. In the absence of any penal or civil enforcement provisions, the Court upheld an injunction issued by the trial court at the request of a labor union, observing:

> The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists. *Marbury* v. *Madison*, 1 Cranch 137, 162, 163.

Id. at 569-570. See also *Burke* v. *Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970), where the court

inferred a cause of action for an individual employee under the same section of the Act. And in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944), this Court inferred a civil cause of action under another section of the Act, requiring labor unions, when acting as bargaining representatives, to represent all the employees within the working unit to which its members belong. Although the section provided only for criminal penalties, the Court held that Negro firemen had an implied cause of action to enjoin a union from refusing to represent them. See also *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944).

Securities law has long been a fertile area for the inference of civil remedies. Federal courts have allowed private damage actions for penal violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (prohibiting manipulative or deceptive practices in the purchase or sale of securities), both for the benefit of defrauded sellers, *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512 (E.D.Pa. 1946); *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), and for the benefit of defrauded purchasers, *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951), notwithstanding the absence of any provision in the Act authorizing such private remedies.[2] And in *J. I. Case Co.* v. *Borak*, 377

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[2] *Kardon*—a decision which the Fifth Circuit, in *Hooper*, described as "the trail-blazer decision" in the field of securities law and implied civil remedies (282 F.2d at 201)—noted that, while the legislature "[o]f course • • • may withhold from the parties injured the right to recover damages by reason of violation of a statute," the right "is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly" (69 F.Supp. at 514). The court, significantly, found no sufficient evidence of a legislative intent to withhold the private right of action there relied on in the fact that other sections of the Act (§§ 9, 16, and 18, 15 U.S.C. §§ 78i, 78p, and 78r), each making a defined type of conduct illegal, expressly provided for civil actions by the victims of such conduct. These other provisions had been relied on by the defendants in *Kardon* for their claim that § 10(b) (which contained no comparable provision) had

U.S. 426 (1964)—a decision we shall consider in more detail *infra*—this Court inferred a right to bring a civil cause of action based on alleged violation of another section of the same Act (§ 14(a), 15 U.S.C. § 78n(a)). *Borak*, indeed, would appear to have laid to rest any question as to the existence of implied civil remedies in the field of securities law.[3]

Several courts have held that the criminal antidiscrimination provisions of the Federal Aviation Act implied civil remedies in cases where passengers on oversold flights had been "bumped' 'in favor of other passengers. In addition to criminal penalties, the statute provides for prospective administrative action, *i.e.* the Civil Aeronautics Board can issue orders compelling future compliance. Notwithstanding these specifically prescribed remedies, however, a right to sue for damages was inferred in favor of the passengers who had been "bumped". See *Fitzgerald* v. *Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956); *Wills* v. *Trans World Airlines*, 200 F.Supp. 360 (S.D.Cal. 1961); *Mortimer* v. *Delta Air Lines*, 302 F.Supp. 276 (N.D.Ill. 1969).

The congressional franking privilege statutes, 39 U.S.C. §§ 3210-3212, are other examples of federal regulatory enactments violation of which may be civilly redressed. The courts

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not been intended by Congress to confer such a right of action impliedly. The court, while conceding that the defendant's argument was "not without force," concluded that it lacked the persuasiveness needed to overcome the inference that a legislature which has proscribed defined activity for the benefit of a particular group intends that members of the group shall have the right to sue civilly to enforce their rights. *Ibid.* The court also noted that if "the whole question [were] one of statutory interpretation it [the defendants' argument] might be convincing," but that "the question is only partly such." *Ibid.*

[3] See also *Goldstein* v. *Groesbeck*, 142 F.2d 422 (2d Cir.), certiorari denied, 323 U.S. 737 (1944), where a shareholder was permitted to base a derivative suit on the provision of the Public Utility Holding Company Act prohibiting unregistered holding companies from entering into construction or service contracts.

uniformly hold that candidates for election to Congress may secure injunctive relief against violations of these statutes by their incumbent opponents. See, *e.g.*, *Schiaffo* v. *Helstoski*, 492 F.2d 413 (3d Cir. 1974); *Belardino* v. *Murphy*, 364 F. Supp. 1223 (S.D.N.Y. 1972); *Hoellen* v. *Annunzio*, 348 F. Supp. 305 (N.D.Ill. 1972), affirmed, 468 F.2d 522 (7th Cir. 1972), certiorari denied, 412 U.S. 953 (1973); *Rising* v. *Brown*, 313 F.Supp. 824 (C.D.Cal. 1970). And see *Levy* v. *Abzug*, 355 F.Supp. 1299 (S.D.N.Y. 1972); *Van Hecke* v. *Reuss*, 350 F. Supp. 21 (E.D.Wis. 1972); *Straus* v. *Gilbert*, 293 F.Supp. 214 (S.D.N.Y. 1968) (recognizing the power to enjoin but denying relief on the merits).

In *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir. 1947), the Second Circuit inferred a right to maintain a private cause of action for damages for injury resulting from violation of the Federal Communications Act, 47 U.S.C. § 605, prohibiting the unauthorized interception and use of telephone communications. Although the statute provides criminal penalties only, the court, in an opinion by Judge Learned Hand, allowed a private action by the person whose conversation had been intercepted, concluding that:

> [W]e can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.

Id. at 694. Applying a similar test, the Fifth Circuit, in *Gomez* v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969), allowed a private right of action in favor of migratory farm workers as beneficiaries of the Wagner-Peyser Act, 29 U.S.C. § 49 *et seq.* Even though a civil remedy was provided in the statute (the Secretary of Labor could prospectively cut off funds to states which directed workers to jobs where the working conditions were substandard), this was found inadequate to achieve the legislative objective. Invoking the rationale of this Court's decision in *Texas &*

Pacific Railway v. *Rigsby, supra,* and noting that the principle of that decision had been applied by the lower courts in a wide range of regulated areas, the court concluded that the Act and implementing regulations called "imperatively for implied remedies" if the law's objective, the protection of workers, was to be achieved (417 F.2d at 576).

In *Stewart* v. *Travelers Corporation,* 503 F.2d 108 (9th Cir. 1974), the Ninth Circuit held that an employee who had allegedly been discharged in violation of § 304(a) of the Consumer Credit Protection Act of 1968, 15 U.S.C. § 1674(a) (prohibiting dismissals due to single-debt wage garnishments), had an implied right to sue civilly for reinstatement and back pay. The court concluded that, unless there is clear congressional intent to the contrary, the right to private relief must be inferred from such a statute where this is necessary to ensure full effectuation of the legislative purpose (503 F.2d at 112). Similarly, in *Fagot* v. *Flintkote Company,* 305 F. Supp. 407 (E.D.La. 1969), the court allowed an employee, fired in violation of § 15 of the Fair Labor Standards Act, 29 U.S.C. § 215, to bring a private suit to recover damages for his loss of pension, life and health insurance, and salary. The court rejected the claim that plaintiff was required to depend upon criminal prosecution or civil action by the Secretary of Labor for vindication of his rights, concluding:

> [E]ffective implementation of a law prohibiting certain behavior includes recognition of a civil cause of action on the part of persons injured by the proscribed conduct. The general theoretical basis for inferring a right to sue where the statute is silent rests on the conviction that the protection given those persons for whose benefit the statute was enacted would be incomplete if it could be enforced only by criminal sanctions or by injunction obtained to protect the State's interests.

Id. at 410.

Finally, in *Common Cause* v. *Democratic National Committee,* 333 F.Supp. 803 (D.D.C. 1971), a decision particularly pertinent here because it too involved the integrity of

the electoral process, it was held that 18 U.S.C. §§ 608 and 609 (1970)[4] created implied civil remedies for their violation. These statutes prescribed criminal penalties for exceeding stated limits on individual contributions (§ 608), and for exceeding similarly prescribed limits on the receipt and expenditure of funds by political committees (§ 609), in connection with campaigns for elective federal office. The plaintiffs—consisting of this *amicus curiae,* its chairman, two incumbent Congressmen, and a number of individual citizens, voters, and campaign contributors and workers—had sought declaratory and injunctive relief against the Democratic and Republican National Committees, and the Conservative Party, to protect their private beneficial interests under the statutes, contending that the defendants had continually and with impunity been circumventing their provisions illegally over the years. Rejecting a claim that the plaintiffs lacked standing to maintain the suit, the court noted that:

> If John W. Gardner and other voters, contributors, and campaign workers, and Congressmen Bingham and Gude as candidates comply with Sections 608 and 609 while other candidates and their supporters do not, the votes of the plaintiffs and their efforts to effect the nomination or election of individuals are likely to be, as a practical matter, diluted or even nullified.

333 F.Supp. at 808. This sufficed to show, the court observed, that the plaintiffs were asserting, within the meaning of *Baker* v. *Carr,* 369 U.S. 186, 208 (1962),

> "'a plain, direct and adequate interest in maintaining the effectiveness of their votes' • • •, not merely a claim of 'the right, possessed by every citizen to require that the Government be administered according to law • • •.'"

Ibid. Satisfied from the legislative history of the statutes that persons in the plaintiffs' situation "were the intended

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[4] Section 608 has since been amended by the Federal Election Campaign Act of 1971, Public Law 92-225, § 203, 86 Stat. 9, and by the Federal Election Campaign Act Amendments of 1974, Public Law 93-443, § 101(a), 88 Stat. 1263. Section 609 has since been repealed by the 1971 Act, § 204, 86 Stat. 10.

beneficiaries of the statutes and comprise a class whose interests may be protected by a private civil action" (333 F.Supp. at 812), and noting that "the inability of the Justice Department to enforce these laws emphasizes both the inadequacy of relying upon criminal liability and the lack of reason to fear interference with criminal prosecutions" (*id.* at 813), the court concluded that:

> If the facts are as alleged, this is a flagrant and irreparable erosion of the right to an effective vote, and, in the absence of an express statutory provision to the contrary, clearly warrants immediate judicial relief.

Id. at 814.[5]

B. The Criteria Suggested by This Court for Determining When a Civil Remedy Is Impliedly Authorized by a Penal Enactment Are Met in This Case

It is apparent from what precedes that it is a well-settled principle, rooted in the common law and sanctioned by this Court, that a criminal statute can by implication grant to members of the class for whose protection it was enacted the right to private remedial relief for its infringement. It remains but to consider whether the court of appeals correctly held 18 U.S.C. § 610 to be such a statute. We submit that under the criteria suggested by this Court's recent decisions in the field that holding was correct and that the court of appeals,

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[5] The court, accordingly, denied motions to dismiss except as to the Congressmen-plaintiffs, whose suit, the court thought, for the reasons stated in the opinion (333 F.Supp. at 814), had been premature.

For decisions citing *Common Cause* with approval, see, *e.g.*, *Tax Analysts and Advocates* v. *Shultz*, 376 F.Supp. 889, 898-899 (D.D.C. 1974); *National Association for Community Development* v. *Hodgson*, 356 F.Supp. 1399, 1403 (D.D.C. 1973); *Ash* v. *Cort*, 350 F.Supp. 227, 231 (E.D.Pa. 1972) (the district court decision in this case); *Farmland Industries, Inc.* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 349 F.Supp. 670, 678-679 n.1 (D. Neb. 1972), affirmed, 486 F.2d 315 (8th Cir. 1973).

consequently, correctly determined that respondent's suit had been improperly dismissed.

The first of this Court's recent decisions involving the doctrine of implied civil remedies was *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). There, a stockholder, suing derivatively, sought rescission of the merger of Case with another company on the ground that, in the solicitation of proxies for use at the stockholders' meeting at which the merger was voted, false and misleading statements had been made, in violation of § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and Rule 14a-9 promulgated thereunder by the Securities and Exchange Commission. Section 14(a) made it unlawful for any person to solicit any proxy in contravention of any rule or regulation of the Commission, and Rule 14a-9 forbade false or misleading statements in proxy solicitations. Violation of any provision of the Act, or of any rule or regulation thereunder, was made criminally punishable (§ 32, 15 U.S.C. § 78ff), but neither § 14(a) nor any other provision of the Act expressly provided for a civil cause of action by one harmed by a § 14(a) violation. However, § 27 of the Act, 15 U.S.C. § 78aa, provided generally that the federal district courts should have jurisdiction of violations of the Act "and of all suits in equity and actions at law brought to enforce any liability or duty created by" the Act or regulations. The defendants, noting that § 14(a) did not expressly grant private rights of action thereunder, contended that § 27 merely conferred jurisdiction on the federal courts in proceedings under the Act and could not in itself be deemed to create such a right. This Court, sustaining the stockholder's right to sue, held that "[i]t appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act." *Id.* at 430-431.

It should be emphasized that, notwithstanding the Court's reference to § 27, the cause of action which *Borak* sustained was implied—as Judge Parker noted in *Common Cause* v. *Democratic National Committee*, *supra*, 333 F.Supp. at 810,

and as this Court itself recognized in *Allen* v. *State Board of Elections*, 393 U.S. 544, 557 (1969)—by § 14(a), not § 27. It was § 14(a) that created the duty, violation of which was held to be actionable by shareholders. Section 27 merely specified the forums in which rights defined or implied by other provisions of the Act could be litigated. That it was § 14(a) from which the right of action was inferred is clear from the Court's analysis. The Court observed that the purpose of § 14(a), as reflected by its legislative history, was to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation; noted that the section's broad remedial purposes were evidenced by the language of the section, which expressly referred to "the protection of investors"; and concluded that, while the section made "no specific reference to a private right of action," its reference to "the protection of investors" *"certainly implies the availability of judicial relief where necessary to achieve that result"* (377 U.S. at 431-432, emphasis added).

It should also be emphasized that certain sections of the Securities Exchange Act, unlike § 14(a), explicitly provide for private civil remedies for their violation (see §§ 9, 16, and 18, 15 U.S.C. §§ 78i, 78p, 78r). This Court apparently found this fact to be irrelevant to its construction of § 14(a), since the fact is mentioned nowhere in the *Borak* opinion. Cf. *Kardon* v. *National Gypsum Co.*, *supra*, 69 F.Supp. at 514, and discussion *supra*, pp. 11-12, n. 2.

In addition, the Court found that government enforcement of the Act was inadequate to protect stockholder interests. Noting that the Securities and Exchange Commission receives more proxy statements annually than it is able to analyze in depth, the Court observed that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action." *Id.* at 432. Based on these and other considerations, the Court concluded:

> We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. * * * It is for the federal courts "to adjust their remedies so as to grant the necessary relief" where federally secured rights are invaded.

Id. at 433, quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

Three years after *Borak*, this Court further elucidated the principle of implied civil remedies in *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), a decision which, it has been suggested, contains this Court's "most definitive statement allowing civil relief for violation of criminal statutes." *Common Cause* v. *Democratic National Committee*, *supra*, at 810. In *Wyandotte*, and in a companion case consolidated for review, the Court considered actions brought by the United States against individuals who it claimed had been negligently responsible for the sinking of vessel in inland waterways. Section 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, declared unlawful the voluntary or negligent sinking of any vessel in such waters, and provided that the owner of any craft so sunk must commence its immediate removal; failure to do so would be considered abandonment and subject the craft to removal by the United States. The United States had sought a declaratory judgment in the companion case that the parties responsible for the sinking were responsible for removing the craft; in the principal case (*Wyandotte*) the United States had removed the vessel and sought to recover the costs from the parties it claimed had been responsible. Section 15 did not authorize civil suits to enforce its provisions or otherwise provide for the declaratory and monetary relief sought by the United States. Section 16 of the Act, 33 U.S.C. § 411, imposed criminal penalties upon persons who violated or abetted violation of § 15. Sections 19 and 20, 33 U.S.C. §§ 414, 415, permitted the United States a limited civil remedy: to dispose of such vessels and their cargoes and to retain any profits without liability to the owners.

The Court rejected the owners' contentions that, since injunctive and monetary relief was not included with the enumerated remedies for violation of the Act, such relief was not

available. Such an interpretation, the Court declared, would be "at variance with the purpose of" the statute, with the Court's own prior construction of the Act, and with the Court's prior decisions on analogous issues. *Id.* at 200. "There is no indication * * * in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law," the Court noted, "that Congress might have intended that a party who negligently sinks a vesssel should be shielded from personal responsibility. We therefore hold that remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive." *Id.* at 200-201. The Court recalled in this connection that in *Rigsby* and *Borak* it had concluded

> that criminal liability was inadequate to ensure the full effectiveness of the statute which Congress had intended. Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper.

Id. at 202.

It should be emphasized that, although the plaintiff in *Wyandotte* was the United States, the holding is fully applicable to the rights of private parties as well. In fact, the Court's articulated purpose was to extend to the government rights that plainly would have been available to private citizens under *Rigsby* and *Borak*. *Id.* at 202.

The most recent case on implied rights of action to come before this Court was *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). Under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, any State covered by its provisions was restricted in denying the right to vote to any individual on the ground that he failed to comply with a voting qualification or prerequisite to voting different from that in force or effect on November 1, 1964. The State could do so only if (1) it had submitted the new enactment to the United States Attorney General and that official had not objected to the provision within sixty days, or (2) it had obtained a declaratory judg-

ment in the United States District Court for the "District of Columbia that the new provision did not have the purpose, and would not have the effect, of abridging the right to vote on account of race. Section 12(d) of the Act, 42 U.S.C. § 1973j(d), authorized the Attorney General to bring civil suits to enforce § 5. Any violation of the Act was expressly made a crime by § 11, 42 U.S.C. § 1973i.

Four suits had been brought by private citizens seeking declaratory judgments that various regulations governing voting practices and procedures fell within the provisions of § 5 and thus had to be submitted for review. The Act, however, did not authorize private declaratory judgment suits to enforce this approval procedure, and the Court therefore considered as a threshold question whether such private suits could be brought. Finding that the Voting Rights Act was drafted "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens," the Court held that the appellants could seek not only declaratory judgments but also injunctions against enforcement of the state regulations without compliance with the procedural scheme set forth in § 5.

The Court made clear that one of the primary factors leading to the ruling was the lack of adequate federal resources for the enforcement of § 5. "The achievement of the Act's laudable goal could be severely hampered," it declared, "if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Id.* at 556. The Court noted that § 5 applied not only to the States but to their many political subdivisions and that each of these governmental units could issue regulations and enactments; it also noted that "[t]he Attorney General has a limited staff and often might be unable to uncover quickly" problems raised by such newly-enacted provisions, and that as of January 1968 the Attorney General had brought only one suit to force State compliance with § 5. *Id.* at 556. Given these facts, the Court declared, private suits to enforce procedural compliance with the Act were consistent with the Act's broad purposes. *Id.* at 57. The Court

explicitly analogized the issue that had been before it in the *Borak* case:

> We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private cause of action.

Id. at 557. The Court concluded that, unless private rights of action were permitted, the purpose of the Act, that no person be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, "might well prove an empty promise." *Id.* at 557.[6]

From these three cases—*Borak*, *Wyandotte*, and *Allen*—there emerges a doctrine of implied civil remedies that revolves around three questions:

(1) Does the plaintiff fall within the class that the statute was intended to protect?

(2) Is the harm that has occurred of the type that the statute was intended to forestall?

(3) Are the criminal or civil remedies explicitly provided adequate to ensure full effectiveness of the statute?[7]

When these tests are applied to the case at bar, the conclusion is inescapable, it is submitted, that this is a suitable case for the inference of a civil remedy.

Respondent, as a registered voter and corporate shareholder, is within the classes which Congress sought to protect. Since its first enactment in 1907, 34 Stat. 864, the prohibition against

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[6] Cf. Mr. Jutsice Harlan's view that whether an implied civil remedy should be recognized depends on whether the claimed "compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 407 (concurring opinion).

[7] At least two lower courts have adopted this formulation of the applicable tests. *National Association for Community Development* v. *Hodgson*, 356 F.Supp. 1399, 1403 (D.D.C. 1973); *Common Cause* v. *Democratic National Committee*, *supra*, 333 F.Supp. at 810-811.

corporate political donations has been intended to protect both voters' claims to the primary allegiance of their elected representatives and the right of shareholders to have their invested funds used solely for legitimate business purposes. In discussing the history of § 313 of the Corrupt Practices Act of 1925, 43 Stat. 1074, the predecessor of § 610, this Court found that:

> [The 1907] legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders.

United States v. *C.I.O.*, *supra*, 335 U.S. at 113. This dual purpose has been reaffirmed in the recent revisions of the statute effected by the Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3. See 117 Cong. Rec. 43379-81 and 43384-85 (1971). Thus respondent falls squarely within each of the classes that § 610 was intended to protect.

In addition, the harm suffered by respondent is precisely the harm which § 610 and its predecessors were intended to prevent. Justice Frankfurter in *United States* v. *Auto Workers*, *supra*, 352 U.S. at 570-584, sets out at length the history of Congress' attempt to grapple with the problem of corporate money in politics. In this case, as in the past, corporate funds were apparently used to sway public opinion in favor of a particular candidate. And respondent's share of the corporate money, his investment, was used without his permission in aid of a candidate whom he did not support.

Finally, no other remedy will protect this shareholder's interest. Criminal prosecution of the corporation or its officials, even should it be undertaken (but see *infra*, pp. 24-28), will neither prevent the officials from repeating their illegal acts in the future nor return the money illegally taken from the corporation. If respondent is not entitled to the relief that he seeks, the broad remedial purposes of the statute, as outlined in *Auto Workers*, *supra*, will be defeated.

C. The Inference of a Civil Remedy Is Particularly Appropriate in the Case of a Statute, Like § 610, That Is Designed To Preserve the Integrity of the Electoral Process, Since Experience Teaches That Such Statutes Are Unlikely to be Effectively Enforced

A key test, as noted above, of whether a criminal statute is to be construed as impliedly providing a civil remedy for its infringement is whether the explicitly prescribed penal sanction adequately ensures achievement of the enactment's purposes. If it appears that it will not, an intent by the legislature to create a private civil remedy will be inferred absent clear evidence to the contrary. This test is particularly relevant in the case of a statute, like § 610, that is designed to preserve the integrity of the electoral process. For experience has taught that the penal sanctions of such statutes are unlikely to be effectively enforced.

That campaign financing laws, "corrupt practices" enactments, and similar statutes relating to the conduct of elections have rarely been criminally enforced is a generally acknowledged and widely deplored fact. As an observer of the political scene recently noted, "[t]he federal election laws—particularly those related to campaign financing—have gone openly and notoriously unenforced for more than 30 years." [8] The reason for this is apparent. As the same observer pointed out:

> An incumbent Attorney General has an obvious conflict of interest in investigating or prosecuting a campaign violation * * * by a member of his own Administration or party. And because of the "live and let live" principle of elective politics in countries with frequent transfers of power, the same conflict of interest also carries over to cases involving members of the opposition party.[*]

[8] Cutler, *Should We Have a Permanent Public Prosecutor?* (Outline of paper prepared for the Committee for Public Justice, appended to testimony by the author at Hearings before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, 93d Cong., 2d Sess., on S. 2803 and S. 2978, March 26, 27, 28 and April 2, 1974, pp. 233, 363).

That the particular provision involved here, the prohibition against corporate campaign contributions, has gone practically unenforced over the years was alluded to at the recent Senate "Watergate" hearings. George Spater, a former chairman and chief executive officer of American Airlines, who had been the first of several corporate officers to confess to the Special Prosecutor that their respective corporations had made such prohibited contributions, related to the Ervin Committee the circumstances that had led him to effect such a payment. Hearings before the Select Committee on Presidential Campaign Contributions, United States Senate, 93d Cong., 1st Sess., Book 13, November 7, 8, 13, 14, and 15, 1973, pp. 5494-5521. Asked to account for his action in light of the prohibition against the practice "since 1910 or so," the witness said that he had yielded to pressure for a contribution (by the personal attorney for the President), but that

> [t]here is another element, of course, that for the first time since 1910 the law is being enforced. The law has been in effect for 60 years and has never been enforced until a special prosecutor was appointed.

Id., p. 5512.

The fact that campaign financing laws are rarely enforced has in effect been acknowledged by the Justice Department. In *Ralph Nader, et al.* v. *John N. Mitchell, et al.*, Civ. Action No. 243-72 (D.D.C. 1972), the defendant Attorney General submitted to the court, as an attachment to a pleading, Attorney General Brownell's Order No. 41-54, dated February 9, 1954, relating to "Elections, Election Campaigns, and Political Activity" Referring to the reporting provisions of the 1925 Corrupt Practices Act, requiring the filing of financial statements by political committees and candidates with the Clerk of the House of Representatives or the Secretary of the

[*] *Id.* See Hearings (preceding footnote), p. 364.

Senate, the Order stated that "[a]lthough the * * * provisions * * * carry a criminal penalty, they are, nevertheless, primarily administrative in nature," and that for that reason it was the policy of the Justice Department "not to institute investigations into possible violations of the laws in question in the absence of a request from the Clerk * * * or the Secretary * * *." [10] The Clerk of the House and the Secretary of the Senate, however, claimed in the same lawsuit that they had no duty to see that the law's requirements were complied with—that their only responsibility was to act as depositories for any reports that might be filed.[11]

The establishment, effective as of January 1, 1975, of an independent Federal Election Commission was due to the widely held conviction that the enforcement of the election laws had been inadequate. The Commission was created by § 310(a) of the Federal Election Campaign Act of 1971, Public Law 92-225, as amended by § 208(a) of the Federal Election Campaign Act Amendments of 1974, Public Law 93-443, 88 Stat. 1280. An unsuccessful attempt had been made to create such a Commission as part of the original 1971 Act. Supporters of such a provision had cited the failure of the earlier enforcement efforts as the prime justification for creation of such a Commission. *E.g.*, Senator Brooke observed during the debates on the 1971 bill that prior legislation dealing with elections had not "been adequately enforced over the years by the responsible officials of the Congress and the Justice Department" and that he therefore strongly supported a proposed amendment that "would create an independent Federal Elections Commission to supervise the enforcement of campaign laws" (117 Cong. Rec. 29004) (August 3, 1971). See also comments of Senator Prouty at 117 Cong. Rec. 29002. Similarly, in 1974, in criticizing a House bill to amend the 1971 Act for its failure to provide for such an independent Commission, Representative Frenzel noted that:

> Historically, campaign finance reform legislation has been a failure because of the lack of effective enforcement. The Corrupt Practices Act was almost never effective in its 50 year life. The failure of the Justice Department to prosecute in 1972 is widely known. No administration or enforcement agency that is in any manner politically encumbered has ever done an adequate, consistent job in administering and enforcing election law.
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> * * * With a highly visible Commission, the public would expect and have confidence in nonpartisan, vigorous enforcement of the law.

H.R. Rept. No. 93-1239 to accompany H.R. 16090, 93d Cong., 2d Sess., p. 140 (Supplemental Views).[12]

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[10] Points and Authorities in Support of Motion to Dismiss of Defendant Attorney General and Defendant United States Attorney, Appendix A, pp. 3-4.

[11] See, *e.g.*, Points and Authorities in Support of Motion to Dismiss of Defendant W. Patrick Jennings, Clerk of the House of Representatives, pp. 3-4.

[12] Another statute, relating to the political process, that has never been adequately enforced is the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270. In 1970, the executive vice president of the American Society of Association Executives estimated that there were 3,500 nonprofit, multi-purpose associations to which the Lobbying Act might be applicable. Hearings before the Committee on Standards of Official Conduct, House of Representatives, 91st Cong., 2d Sess., on H. Res. 1031, October 1, 7, and 8, 1970, p. 127 ("Hearings"). Only 192 of those associations have registered pursuant to the Act. Cong. Rec. H8523 *ff.* (daily ed. August 16, 1974). Enforcing the provisions of the Act against these associations alone, therefore, would obviously be an enormous task, to say nothing of their enforcement against other covered individuals and entities. At present, the Department of Justice assigns only five attorneys to enforcement of the Lobbying Act, and these five, having numerous other responsibilities, work only part-time at this task. The situation is little different now from what it has been in past years. Not only are enforcement resources—in time, money, and manpower—in woefully short supply, but there is no effective mechanism to assure compliance with the Act. The Justice Department responds only to complaints by the Clerk of the House of Representatives. The Clerk,

This Court, as previously noted, in finding an implied private remedy in the Voting Rights Act of 1965, observed that "[t]he achievement of the Act's laudable goal could be severely hampered * * * if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen* v. *State Board of Elections, supra,* 393 U.S. at 556. Cf. *J. I. Case Co.* v. *Borak, supra,* 377 U.S. at 432; *Wyandotte Transportation Co.* v. *United States, supra,* 389 U.S. at 202. This rationale, clearly, is even more pointedly relevant in the case of a statute, like § 610, that is designed to preserve the purity of the electoral process—for experience has shown, as above indicated, that the Attorney General rarely enforces statutes of this type at all.

D. There Are No Countervailing Reasons for Not Inferring a Civil Remedy Here

1. *That Congress, in Title III of the Federal Election Campaign Act of 1971, provided an express civil remedy for violation of that Title's provisions, but in Title II, though it amended § 610, did not similarly provide a civil remedy for its breach, is not a valid basis for inferring, under the "expressio unius" rule of construction, that Congress intended that violation of § 610 should be irremediable civilly*

Petitioners' and Judge Aldisert's reliance on this Court's decision in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974) (the "*Amtrak*" case), and on the rule of construction, "*Expressio unius est exclusio alterius,*" on which that decision was based, is, we submit, misplaced.

In that case the respondent, the National Association of Railroad Passengers, a private association composed of pa-

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however, holds to the view that he has no authority under the Act to refer apparent violations to the Justice Department for investigation—that he has "no enforcement powers" and acts "just more or less [as] a depository for voluntary information * * *". Hearings, p. 121.

trons of the railways, had sued to enjoin the National Railroad Passenger Corporation ("Amtrak") from discontinuing certain passenger trains, on the ground that the proposed discontinuations were unauthorized by the Rail Passenger Service Act of 1970, 84 Stat. 1327, 45 U.S.C. § 501 *et seq.* (the "Amtrak" Act). Section 307(a) of that Act, 45 U.S.C. § 547 (a), provided so far as relevant that:

> If the Corporation [Amtrak] or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, * * * refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, * * * refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, * * * *upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby,* * * * to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat. [Emphasis added]

The district court had dismissed the action and this Court, in reliance on the above-emphasized language of § 307(a), ruled that the dismissal had been proper. Referring to the "frequently stated principle of statutory construction * * * that when legislation expressly provides a particular remedy or remedies, the courts should not expand the coverage of the statute to subsume other remedies"—which principle, it was noted, reflected the ancient maxim that "*expressio unius est exclusio alterius*"—the Court held that, aside from the specifically excepted situation of a dispute involving a labor agreement, the only civil cause of action authorized by the Act was the public one mentioned, by and in the name of the Attorney General (414 U.S. at 456-458). "Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances," the Court noted, "this maxim would clearly compel the conclusion that the remedies created in

§ 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act." *Id.* at 458.

The *Amtrak* decision, thus, it is clear, is readily distinguishable from this case. What made the *expressio unius* rule relevant in that case was that the Amtrak Act expressly provided a civil remedy for violation of its provisions—a remedy which, because it was public in nature, was held to have impliedly barred the private remedy that had there been invoked. 18 U.S.C. § 610, on the other hand, the statute involved here, contains no *express* provision for *any* civil remedy. Its only express sanction is the penal one of fine or imprisonment—and it is well settled, as we have seen, that the fact that a statute makes defined conduct punishable not only does not preclude, but is precisely the basis for, the implication of a private civil remedy. This case, in short, differs from *Amtrak* precisely in the respect on which the holding there turned. As the majority below noted, "For the *Amtrak* rule to apply, the statute must expressly provide * * * a remedy that logically may be said to be exclusive" (496 F.2d at 421).

Petitioners contend (Pet. Br. 23-27), however, and Judge Aldisert was of the view, that despite this critical difference between the two cases the *Amtrak* decision, and particularly its *expressio unius* rationale, requires reversal of the court of appeals' judgment. They rely on a comparison of the provisions of Titles II and III of the Federal Election Campaign Act of 1971 ("FECA"), Public Law 92-225, 86 Stat. 3. The claim, we submit, is without merit.

Title *III* of the Act, 2 U.S.C. § 431 *et seq.* (1970 ed., Supp. III), was a comprehensive, carefully integrated, and largely new set of provisions relating to the reporting and disclosure of campaign contributions and expenditures. It made no reference whatever to § 610. The sole provision claimed to be relevant, § 308(d)(1), 2 U.S.C. § 438(d)(1), provided an express civil remedy for violation of the Title's substantive

commands and prohibitions.[13] The Section, which supplemented the Title's penal provisions (contained in § 311, 2 U.S.C. § 441), provided in relevant part that anyone who believed that a violation of any provision of the Title had occurred might file a complaint with a designated official (called the "supervisory officer"[14]), and that whenever in that officer's judgment (after notice and opportunity for hearing) any person had engaged or was about to engage in any acts or practices that constituted or would constitute a violation of any provision of the Title,

> the Attorney General on behalf of the United States shall institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. * * *

The Section, in short, provided for a public cause of action, to be brought by the Attorney General, essentially similar to the public civil remedy involved in the *Amtrak* case, *supra*.

Title *II* of the Act, 86 Stat. 8, was unlike Title III in that (among other things) it did not purport to establish any comprehensive, or new, or self-contained body of rules on any subject. Captioned "Criminal Code Amendments," the Title effected what the caption suggested it was intended to accomplish—it amended in various respects a miscellany of Criminal Code sections. Its sole alleged pertinence lies in the fact that 18 U.S.C. § 610, the statute involved here, was one of the sections so amended. It is pertinent to note, moreover, that the amendment of § 610 consisted, not of a revision, or rewriting, of the Section, but of the addition of a new

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[13] Section 308(d)(2)-(5), 2 U.S.C. § 438(d)(2)-(5), contained ancillary provisions defining incidents of the civil remedy authorized.

[14] The "supervisory officer" was defined in § 301(g), 2 U.S.C. § 431(g), to mean the Secretary of the Senate, the Clerk of the House of Representatives, or the Comptroller-General, depending upon the office to which the candidate involved aspired.

paragraph (its fourth) explanatory of a phrase, "contribution or expenditure," used in the Section. The sole purpose of the amendment, its legislative history shows, was to codify existing case law as to the meaning of the phrase. 117 Cong. Rec. 43379-43391 (1971). The amendment, it should be stressed, has no present relevance beyond the suggested significance of what it did *not* do.

Petitioners and Judge Aldisert read significance into the fact that Congress, on the one hand, in Title III of the Act, provided an express civil remedy for violation of that Title's provisions, but failed, on the other hand, in Title II of the Act, though it amended § 610, to provide a civil remedy for violation of *it*. In reliance on the *expressio unius* maxim, they contend that Congress' provision for the remedy in the one situation and its silence as regards it in the other reflect a deliberate legislative judgment that there should be *no* civil remedy for violation of § 610. The reasoning, we submit, is unpersuasive.

The express provision in Title III for a public civil action for violation of that Title's commands "may well bar inference," as the majority below remarked, of a *private* remedy for violation of *those* commands (496 F.2d at 421-422 n. 4). This Court, indeed, in *Amtrak*, in a similar legislative context, held just such inference to be unwarranted. Clearly, however, it is an entirely different thing to suggest that the Title III remedy provision can plausibly be said—because Congress, in another Title, amended in a minor respect a long-standing Criminal Code section without addressing itself in that instance to remedy considerations—to evidence a deliberate determination by Congress that violation of the Code section should not be remediable civilly. There simply is no basis, we submit, for an *expressio unius* inference in such a context. Like the majority below, we

> do not * * * believe that any intent to bar the remedies sought here can be inferred from the 1971 Act's grant of a civil, as well as a criminal, action for violation of conduct first proscribed in 1971 and its failure to grant any civil remedies for conduct prohibited since 1907. Amtrak certainly does not require that such an inference be drawn from the 1971 Act's amendment of longstanding criminal provisions coincidentally joined, albeit in separate titles, with promulgation of new civil and criminal actions.

496 F.2d at 422 n. 4.[15]

[15] Petitioners' and Judge Aldisert's reliance on *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), another decision of this Court in which the Court applied the *expressio unius* maxim to ascertain the meaning of a statute, is also mistaken. There, the Court declined to find in the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act) an implied right on the part of shippers, in suits by carriers to collect transportation charges, to defend on the ground that the charges were unreasonable. The Court, noting that the provisions of Parts I and III of the Interstate Commerce Act, relating to rail and water carriers, respectively, granted an express right to shippers to litigate the reasonableness of past charges notwithstanding that the charges were based on the applicable and effective filed rates, emphasized that similar provisions were conspicuously absent in Part II (359 U.S. at 470-471). That no such clean-cut basis for application of the *expressio unius* rule of construction is involved in this case sufficiently appears from the discussion, above, of the claimed justification for the rule's application here. Moreover, as the Court further emphasized in the *T.I.M.E.* case, the Interstate Commerce Commission had itself consistently recognized that nothing in Part II of the Act created a statutory liability on the part of the carrier for past allegedly unreasonable filed rates (the liability the shipper had sought to have recognized in that proceeding), and, even more significantly, prior efforts to amend Part II to provide a remedy similar to that recognized in the other two Parts had consistently been rejected (359 U.S. at 471-472). Obviously nothing remotely comparable to those aspects of the *T.I.M.E.* decision is involved here. Finally it should be noted that *T.I.M.E.* involved a situation, unlike that of this case, in which "the substantive prohibitions of the statute," relied on by the party claiming the implied remedy, were "inextricably intertwined with provisions defining the powers and duties of a specialized administrative body charged with its enforcement" (*Holloway* v. *Bristol-Myers Corporation*, 485 F.2d 986, 989 (D.C. Cir. 1973)). Judicial inference of a private civil remedy for violation of a statutory duty may properly be more cautious in such a context than where, as here, no specialized administrative body charged with the statute's enforcement is involved.

2. *Such light as is thrown by the Federal Election Campaign Act Amendments of 1974 on Congress' intent as to § 610 when it enacted Titles II and III of the 1971 Act refutes rather than supports the "expressio unius" claim based on those Titles*

The Federal Election Campaign Act Amendments of 1974 ("FECA Amendments"), Public Law 93-443, 88 Stat. 1263, were enacted into law on October 15, 1974, and became effective January 1, 1975 (§ 410, 88 Stat. 1304). The new law broadly amends the 1971 FECA, including the latter Act's aforediscussed Title III (§§ 201-210, 88 Stat. 1272-1289).[16] Since the FECA Amendments were not passed until after the court of appeals' decision in this case, they of course have no direct impact on these proceedings. We agree, nevertheless, with petitioners (Pet. Br. 28) that it is appropriate to consider in this case whatever "cross light"[17] the later enactment, *in pari materia* with the FECA, may throw on the intent of Congress in enacting the earlier legislation. *Pipefitters* v. *United States*, 407 U.S. 385, 427 (1972); *Michigan National Bank* v. *Michigan*, 365 U.S. 467, 481 (1961). We disagree, however, with the apparent contention of petitioners that the light thrown by the FECA Amendments supports their principal claim—that by Titles II and III of the 1971 Act Congress evinced the intention that violations of § 610 should be irremediable civilly (Pet. Br. 27-33). In our view the 1974 Amendments, to the extent they are relevant, refute rather than support that suggestion.

Ibid. Section 610, as the majority below noted, "does * * * [not] involve the operation of a regulatory agency whose policy determinations on this or other matters might be threatened by allowing private enforcement" (406 F.2d at 424).

[16] The only direct amendment of § 610 effected by the new Act was to increase the penalties for its violation (§ 101(e)(1), 88 Stat. 1267).

[17] *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945) (L. Hand, J.).

Title III of the FECA, as amended by the 1974 Amendments, provides for a Federal Election Commission ("the Commission"), to be composed of two *ex officio* members (the Secretary of the Senate and the Clerk of the House of Representatives) and six members to be appointed as therein provided (§ 310(a), 88 Stat. 1280). The Commission has the functions, generally, of the "supervisory officer[s]" provided for by the Title as it previously read (see p. 31, *supra*). Section 310 (b) of the amended Title, 88 Stat. 1281, provides that the Commission shall administer, seek to obtain compliance with, and formulate policy with respect to "this Act and sections 608, *610*, 611, 613, 614, 615, 616, and 617 of title 18, United States Code" and that it has "primary jurisdiction" with respect to the "*civil enforcement* of such provisions" (emphasis added).

Section 314(a)(1)(A) of the amended Title, 88 Stat. 1284, provides that any person who believes a violation of "this Act" or of any of the eight mentioned Criminal Code sections has occurred may file a complaint with the Commission. Section 314(a)(2), 88 Stat. 1284, provides that, upon receiving a complaint, the Commission shall notify the person involved of the apparent violation and either report the same to the Attorney General or conduct an investigation of it. Section 314(a)(5), 88 Stat. 1284, provides that if the Commission determines, after investigation, that there is reason to believe that any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of the Act, it may endeavor to correct the violation by informal methods of conference, conciliation, and persuasion; and that if the Commission fails to correct the violation through informal methods, it "may insititute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business." Section 314(a)(6), 88 Stat. 1284, provides that the Commission shall refer apparent violations of chapter 29 of Title 18 of the United States Code (which contains the eight designated sec-

tions) to the appropriate law enforcement authorities. Section 314(a)(7), 88 Stat. 1285, provides that whenever in the judgment of the Commission (after notice and opportunity for a hearing) any person has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of any provision of the Act or of any of the eight Criminal Code sections,

> upon request by the Commission the Attorney General on behalf of the United States shall institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. * * *[18]

Paragraphs (8)-(11) of the same subsection, 88 Stat. 1285, define additional incidents of the judicial remedy thus authorized. The Commission thus may either file a civil lawsuit on its own initiative or request the Attorney General to do so.[19]

It thus appears that Title III as amended continues the Title's original civil remedy provisions—with the changes above noted—and *extends the provisions to violations of § 610* (and of the other indicated Criminal Code sections).[20] Whereas, in other words, the original civil remedy provisions

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[18] Cf. § 308(d)(1) of the Title as it read prior to its amendment (*supra*, p. 31).

[19] The only provision of the amended Title authorizing a direct private action by an individual in a district court is § 315(a), 88 Stat. 1285, which permits the Commission, the national committee of any political party, or "any individual eligible to vote in any election for the office of President of the United States" to "institute such actions in the appropriate district court * * * as may be appropriate to *construe the constitutionality of* this Act or of [any of the eight designated Criminal Code sections]" (emphasis added).

[20] The legislative history of the 1974 Amendments indicates that private civil actions have not been precluded, but only that individuals must exhaust their administrative remedies before filing such suits. H.R. Rept. No. 93-1438, 93d Cong., 2d Sess., p. 94 (Conference Report).

applied only to violations of the commands of Title III itself, the provisions as amended apply to violations of § 610 as well.[21] This hardly suggests, it is submitted, that Congress, in 1971, when it enacted Titles II and III, impliedly intended that violation of § 610 should be civilly irremediable (petitioners' and the dissent's basic *expressio unius* argument). It is unlikely, in other words, that Congress, in 1971, meant impliedly to legislate that there should be no civil remedy for violation of § 610—and that in 1974, changing its mind, it decided to provide that such violations should be remediable. The more reasonable inference, it is suggested, is that when Congress, in 1971, expressly made Title III violations civilly remediable, but said nothing, in Title II, about the remediability of § 610 violations, the explanation for its silence in the latter regard was simply that it did not consider § 610 at that time from a remediability standpoint. (The sole purpose of the 1971 amendment of § 610, as pointed out above, was to codify existing case law as to the meaning of a phrase, "contribution or expenditure," used in the Sec-

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[21] If the 1974 Amendments had been in effect when respondent started this lawsuit, he would have been required, it may be noted parenthetically, under the rationale of the *Amtrak* case, to pursue the civil remedy procedures now prescribed. He would have been required, that is to say, instead of suing in the district court, to make his complaint in the first instance to the Federal Election Commission, which body, if satisfied of the complaint's validity, could have requested the Attorney General, "on behalf of the United States," to institute a civil action for relief. The Attorney General, in that event, would have been bound to file such an action. Cf. § 314 (a)(1)(A) and (7) of amended Title III, mentioned *supra*. Respondent, in other words, had the new Amendments been law when he initiated this suit, would have been required to rely (so far as judicial relief is concerned) on the *public* civil remedy procedures now applicable. But since the Amendments were not in existence when respondent commenced this proceeding, their provisions obviously are inapplicable. Since respondent's suit, under the implied civil remedy doctrine, was proper when it was instituted, it cannot now be deemed invalidated on the basis of provisions that had at that time not yet been enacted.

tion.) Then later, in 1974, when Congress addressed the specific issue, it decided to include violations of § 610—as well as violations of the other Code sections—within the Title's remedy provisions.[22]

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[22] Judge Aldisert, noting respondent's concession below that the legislative history of § 610 does not refer to a private civil remedy, was of the view that that concession was dispositive (496 F.2d at 428-429). Petitioners also make this contention (Pet. Br. 27). Judge Aldisert's conclusion, however, was based on two statements by this Court in the *Amtrak* case, *supra*, which, read in context, in no way support the conclusion the judge drew from them. The Court said in *Amtrak* that "the inference of * * * a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act" (414 U.S. at 458). The Court further stated that "the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent" (*ibid.*). Judge Aldisert, blending segments of the two observations, said he was convinced that the Court had

> meant exactly what it said when it declared that a "private cause of action not otherwise authorized by the statute" may not be implied in the absence of clear "evidence of legislative intent."

496 F.2d at 429. It is evident, however, that the statements of the Court which the judge thus combined and partly quoted do not bear the meaning attributed to them. The Court neither said nor implied that a private cause of action not otherwise authorized by the statute may not be inferred in the absence of clear evidence of legislative intent. Nor is this surprising since the Court, in the *Wyandotte* case, *supra*, had indicated, quite contrariwise, that where recognition of an implied civil remedy will further the purposes of an enactment, such a remedy will be inferred *unless* a clear contrary intent is discoverable (389 U.S. at 200-201). Cf. *Stewart* v. *Travelers Corporation, supra*, 503 F.2d at 110-111 n. 7. Discovery, in other words, from the legislative history or elsewhere, that Congress intended that there be no civil remedy will preclude the inference of such a remedy by the courts, however otherwise appropriate one might seem. This is not to say, however, contrary to Judge Aldisert's suggestion, that the legislative history must contain clear evidence that Congress intended such a remedy before the courts can infer one. As the majority below noted, finding an implied cause of action pursuant to the criteria established by this Court's decisions

> is not entirely an exercise in divining legislative intent. Certainly, legislative intent is relevant; where the legislature clearly has indicated its intent to grant or withhold a cause of action, implicitly or explicitly, courts will give effect to that intent. [Citing *Amtrak*] Absent some reasonably clear indication of legislative attention to the possible creation of a cause of action, however, courts ascertain the policies underlying the substantive law and determine the propriety, as a means of effectuating those policies, of affording litigants a particular remedy. [Citing, *inter alia*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), 395-397 (opinion of the Court), and 402-403 n. 4 (Harlan, J., concurring)]

496 F.2d at 421.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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